

Fashion and Luxury Product Franchising in the European Digital Landscape

Martine de Koning

This article will highlight some of the most pressing developments in the online sale of fashion and luxury products, both in Europe and globally. With new technologies and increasingly digital markets, consumers desire and expect the best buying experience. Consumers travel, and online business is by its nature international. Online purchasing is faster than in the real world, which has a material effect on how businesses operate. It is even disruptive in the sense that aptitude in digital commerce may define success or failure in the fashion industry.



Ms. de Koning

To build and maintain an exclusive brand image, brand owners spend large budgets on advertising, marketing, and events, and consumers are the focal point of these efforts. To stay relevant as a brand, it is critical for a company to continually learn about consumer preferences, which is often accomplished through the collection and analysis of transaction data and consumer profiles. Products and services need to be tailored to what the consumer wants, when and where he or she wants it. To stay competitive, a brand's products and service offerings should exude a uniform brand image. Further, brands need to be aligned in image and vision across multiple online and offline sales channels.

Traditional methods of selling fashion and luxury products via brick and mortar multi-brand retailers are at risk of becoming less effective, unless there is alignment with the digital footprint of the brand and the online activities of all of a brand's retailers. Most brands invest in direct-to-consumer sales on their own websites and in mono-brand stores, including flagship stores. Digital loyalty programs play an important role, with mobile apps designed to support brand loyalty. Targeted advertising gives the consumer precise information on what catches his personal interest, by sending push marketing messages to encourage and influence purchase decisions (e.g. by using cookies, ambient intelligence, dynamic pricing, pricing algorithms to follow competitor pricing, etc.).

Martine de Koning is a partner and attorney at law at the law firm of Kennedy Van der Laan, located in Amsterdam, the Netherlands. Martine is the head of the firm's Commercial and International Trade Law Department and a partner in the Competition Law team.

Most European fashion and luxury brands operate mono-brand stores to showcase the brand's vision and products. These stores can be owned or be part of a mono-brand store network through the licensing of the trademark, a retail concept, and the brand-owner's expertise. Even though many fashion brand owners typically do not charge a franchise fee, many of these relationships may qualify as franchise agreements under national laws in Europe.

This article focuses on the integration of online and traditional offline channels, so-called omni-channels. The positioning of the brand, and maintaining its premium, high-end, luxury image, is key to continued success in the market. This requires a certain degree of control over all points of contact with the consumer. Where these points of contact are owned by the brand, this is a matter of developing a strategy and implementing it within the company. Where these points of contact are not owned, and depending on the contracts at issue, the brand may require the retailer's support, which can be challenging to obtain. It may even require the modernization of traditional profit models. And the European regulatory framework provides even larger challenges. In principle, brand owners cannot prohibit internet sales by licensed retailers, so reserving the online channel for the brand alone is not an option. Vertical price fixing is also, in principle, prohibited, and, therefore, retailers must be free to determine their own prices. Further, the data protection and e-Privacy rules in the EU are among the strictest in the world.¹

All of this means that brand owners must intensively cooperate with independent retailers, brick and mortar outlets, and pure players on events, loyalty programs, promotions, ambient intelligence and targeted advertising. This includes increased data sharing, such as consumer information and pricing data, sensitive issues under both competition and data protection laws. With this increased cooperation comes a focus on direct sales to consumers, both offline and online. Suppliers are thus more directly impacted by consumer laws and consumer data and privacy protection rules than before. Several legal developments affect the regulatory environment, such as the European Union directives on e-commerce, and unfair consumer contracts ("a new deal for consumers"), and the regulation on geo-blocking.²

1. Data protection is out of scope for this article. See MARTINE DE KONING & HESTER DE VRIES, AM. BAR ASS'N F. ON FRANCHISING, ANN. FRANCHISE & DISTRIB. L. DEVS. 2018, ch. 9 (2018).

2. *A New Deal for Consumers*, COM (2018) 183 final (Apr. 11, 2018); *Proposal for a Directive on Representative Actions for the Protection of the Collective Interests of Consumers, and Repealing Directive*, COM (2018) 184 final (Apr. 11, 2018); *Proposal for a Directive Amending Council Directive 93/13/EEC*, (1993) (Apr. 5, 1993) O.J. (L 95); *Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as Regards Better Enforcement and Modernization of EU Consumer Protection Rules*, COM (2018) 185 final (Apr. 11, 2018); Council Regulation 2018/302 l of Feb. 28, 2018 on Addressing Unjustified Geo-Blocking and Other Forms of Discrimination Based on Customers' Nationality, Place of Residence or Place of Establishment Within the Internal Market and Amending Regulations No 2006/2004 and (EU) 2017/2394 and Commission Directive 2009/ (Text with EEA relevance.), 2018 O.J. (L 601).

The importance of Internet platforms remains undeniable. Some regulators in the European Union, such as the European Commission and the German Bundeskartellamt, have launched investigations into, for example, the search engine Google, and the use of (transaction) data by Internet platforms such as Amazon.³ A proposed regulation that aims to ensure transparency, including showing one's own services in ranking above third-party services on search engine results, and adequate dispute resolution, may protect small and medium-sized enterprises from unfair contract clauses.⁴ But is increasing the already dense level of regulation and enforcement action in the European Union really necessary? And, if so, will the industry even benefit from creating a "level playing field"?

All of this background demonstrates that the regulatory environment is dense and difficult to parse. This article will explore many of these issues. It will first focus on the legal implications for (luxury) fashion industry that wishes to ban third-party platforms. Second, it will discuss the heart of omni-channel. Third, the article will discuss recent changes in fashion franchising. Fourth, the author will outline the role of influencers and social media in the industry. Finally, the article will conclude with some notes on velocity in fashion.

I. Internet Sales and Third-Party Platform Restrictions

The European Union is one of the world's largest e-commerce markets.⁵ In 2017, online revenues of retailers were already 19.5% higher than they were in 2016.⁶ The effect of the digital world is now so pervasive that virtually all aspects of economic and social life have a digital dimension. According to European lawmakers, this shift towards a digital economy calls for new legal frameworks. Since May 2015, the European Union has had on its

3. *Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine*, EUROPEAN COMM'N (July 18, 2019), http://europa.eu/rapid/press-release_IP-18-4581_en.htm; *Bundeskartellamt Announces Investigation of Amazon*, GRUNDERSZENE (Aug. 7, 2018), <https://www.gruenderszene.de/business/kartellamt-untersucht-amazon>; *EU Opens Probe into Amazon Use of Data About Merchants. Group Serves in Dual Role as Host and Competitor to Other Sellers on Its Site*, FIN. TIMES (Sept. 19, 2018), <https://www.ft.com/content/a8c78888-bc0f-11e8-8274-55b72926558f>; *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources*, BUNDESKARTELLAMT (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.pdf?__blob=publicationFile&v=2; *The Netherlands Authority for Consumers and Markets Launches Investigation into Abuse of Dominance by Apple in Its App Store*, NETHERLAND AUTH. FOR CONSUMERS & MKTS. (Apr. 11, 2019), <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store>.

4. *Proposal for a Regulation of the European Parliament and of the Council On Promoting Fairness and Transparency for Business Users of Online Intermediation Services*, COM (2018) 238 final (Apr. 24, 2018).

5. *Report from the Commission to the Council and the European Parliament: Final Report on the E-commerce Sector Inquiry*, EUROPEAN COMM'N at 3 (Oct. 5, 2017), http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

6. *Detailhandel realiseert grootste omzetgroei in 11 jaar* (Feb. 13, 2018), <https://www.cbs.nl/nl-nl/nieuws/2018/07/detailhandel-realiseert-grootste-omzetgroei-in-11-jaar>.

agenda a Digital Single Market Strategy with about twenty-three legislative proposals which are designed to, among others, create better access for business and consumers to online goods, services, and content.⁷

According to the e-commerce sector inquiry findings of the European Commission, e-commerce boosts the economy in the European Union.⁸ It generally creates increased competition due to more price transparency.⁹ Restrictions, such as Internet sales by retailers and vertical price fixing, are frowned upon by EU lawmakers and courts. As a result, to maintain some control over the brand positioning and to avoid free riding by retailers that do not invest in quality and service, brand owners increasingly feel the need to protect the luxury image of their products, and to keep control over the quality of their goods and service delivery, through methods such as selective distribution.¹⁰ Selective distribution limits the distribution of products to authorized retailers and end users, thus creating a trusted and closed system of retailers representing the brand. Many brand owners prohibit sales by the retailer through all or certain third-party Internet platforms, because they consider these platforms to be more meeting/trading places rather than a quality-controlled sales environment that is aligned with the brand's vision and image.

In *Pierre Fabre*,¹¹ the Court of Justice of the European Union (CJEU) ruled that an absolute ban on online sales, whether direct or indirectly applied, is a hardcore restriction and thus prohibited under EU competition law, specifically the cartel prohibition laid down in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Hardcore restrictions are defined in Article 4 of the Vertical Block Exemption Regulation (VBER),¹² which relates to vertical restraints, and are typically prohibited as violations of EU competition law. An example of a hardcore restriction is resale price maintenance.

But many vertical restrictions, except hardcore restrictions, can benefit from the safe haven provided by the VBER applicable to vertical restraints.¹³ While Internet sales may not be prohibited,¹⁴ qualitative criteria to website's retailers are permitted.¹⁵ Through a clause in the Dutch Competition Act,

7. *Completing the Digital Single Market—State of Play*, EUROPEAN COMM'N (Oct. 17, 2017), <https://ec.europa.eu/digital-single-market/en/news/completing-digital-single-market-state-play>.

8. *Report from the Commission to the Council and the European Parliament: Final Report on the E-commerce Sector Inquiry*, EUROPEAN COMM'N at 3 (Oct. 5, 2017), http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

9. *Id.* at 5.

10. DE KONING & DE VRIES, *supra* note 1, at 5–6.

11. Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, ECJ (2011) ECR I-9419.

12. *Commission Regulation 330/2010 of Apr. 23, 2010, on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices (Vertical Block Exemption Regulation)*, O.J. (L 2010).

13. *Id.*

14. *Pierre Fabre Dermo-Cosmétique*, ECJ (2011); *see also* 2010 O.J. (C 130/01) Commission Guidelines C 130/01 of May. 19 2010 on Vertical Restraints [hereinafter Commission Guidelines].

15. *Vertical Block Exemption Regulation*, *supra* note 12; Commission Guidelines, *supra* note 14.

the rules of the block exemption also apply to trade in the Netherlands that has no cross-border effect.¹⁶ It is important to note that including a hardcore restriction in a contract leaves the entire contract without the safe harbor of the block exemption.

The CJEU took a more nuanced approach in its December 6, 2017, judgment in *Coty/Akzente*.¹⁷ Coty, a provider of luxury cosmetics in Germany, asked whether Coty could legitimately prohibit its retailer, Parfümerie Akzente, from selling the brand's products via amazon.de. German courts came to different conclusions on the topic of Internet platforms restrictions. Some, but not all German civil courts, and the Bundeskartellamt (Bka) found these restrictions anticompetitive.¹⁸ This has led to a request by the higher regional court in Frankfurt for a preliminary ruling of the CJEU on the interpretation on several points of EU law.¹⁹ In response to these prejudicial questions,²⁰ the CJEU followed the conclusion of Advocate-General Wahl,²¹ the opinion of the European Commission,²² and several Member States (including the Netherlands), except for Germany and Luxembourg.²³ In short, the CJEU confirmed that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods, is not incompatible with TFEU Article 101(1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers, are not applied in a discriminatory manner, and do not go beyond what is necessary.²⁴ In this context, a clause prohibiting distributors from making use of non-authorized third-party platforms, does not constitute a hardcore restriction under VBER Article 4(b) or 4(c).

16. Art. 12 BW.

17. Case C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, ECJ (2017) ECLI:EU:C:2017:941.

18. In earlier cases, some higher regional courts accepted bans on sales via third-party platforms, such as in the Karlsruhe and Munich Courts of Appeals (decisions 6 U 47/08 Kart of 25 November 2009, and U (K) 4842/08 of 2 July 2009, respectively), and in 2015 the Frankfurt Court of Appeal (decision 11 U 84/14 Kart of 22 December 2015). The products at issue were schoolbags and sport items. Recently, the Hamburg Court of Appeal (decision 3 U 250/16 of 22 March 2018) ruled over the lower court decision that a manufacturer of non-luxury but high-quality food supplements and various toiletries may prohibit distributors from selling its goods over third-party platforms. In some cases, including BKA decisions (for example *Sennbeiser* B7-1/12-35 of 24 October 2013 and *Adidas* B3-137/12 of 27 June 2014), a ban on sales via third-party platforms was deemed incompatible with the cartel prohibition.

19. See, Request for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Germany) lodged on 25 April 2016—*Coty Germany GmbH v Parfümerie Akzente GmbH*.

20. See *id.*, ¶ 20.

21. Conclusion of AG N. Wahl, (July 26, 2017), C-230/16, ECLI:EU:C:2017:603.

22. Commission Regulation 330/2010 of Apr. 23, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical Block Exemption Regulation), O.J. (L 2010), O.J. (L 201), para. 54; available at http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf, paras 467, 468.

23. Wahl, *supra* note 21, ¶¶ 61–62.

24. Case C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, ECJ (2017) ECLI:EU:C:2017:941.

The judgment was welcomed by brand owners and suppliers of fashion and luxury products in Europe. In July 2018, the higher regional court in Frankfurt affirmed that perfume maker Coty was within its rights when it prohibited one of its traders from selling its products over Internet platforms.²⁵

Two categories of products justify a selective distribution system in order to preserve quality and ensure their proper use: (1) technically complex products; and (2) luxury (or branded) products.²⁶ A Dutch court had already reached the same conclusion.²⁷ Selective distribution of other products may be block exempted if the market share of both parties is below 30%, and the agreement does not contain hardcore restrictions.²⁸ If these conditions are not met, an individual exemption may still apply.²⁹ In July 2018, the Court of Appeal in Paris ruled that a supplier at the head of a selective distribution network can legitimately prohibit the sale of its products in a marketplace.³⁰ The decision arises from a dispute between Caudalie, a manufacturer of luxury cosmetics, and the third-party platform “1001 pharmacies” owned by eNova Santé.³¹ Immediately after the CJEU ruling, the German Competition Authority held that brand manufacturers do not have carte blanche to issue online marketplace bans.³²

The European Commission is crystal clear in its interpretation of the *Coty* judgment: “[M]arket place bans do not amount to a hardcore restriction under the VBER irrespective of the product category concerned.”³³ The French competition authority more recently followed this interpretation.³⁴ The sale of Stihl products, such as chainsaws, brush cutters, and pole-saws, justified a selective distribution system, which included assistance and consultancy services, to preserve their quality and ensure proper use.³⁵ It is further permissible for a system to include a third-party platform restriction

25. Oberlandesgericht Frankfurt am Main, judgment (July 12, 2018), Az. 11 U 96/14 (Kart); see also Press Release, Luxusprodukte rechtfertigen Vertriebsverbot auf Amazon.de [Luxury products justify sales ban on Amazon.de], <https://ordentliche-gerichtsbarkeit.hessen.de/presse-mitteilungen/luxusprodukte-rechtfertigen-vertriebsverbot-auf-amazonde>.

26. Case C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, ECJ (2017) ECLI:EU:C:2017:941.

27. District Court Amsterdam, judgment, (Oct. 4, 2017) (*NEON/Action Sport*), ECLI:NL:RBAMS:2017:7282. The author represented defendant NEON in the litigation.

28. *Vertical Block Exemption Regulation*, *supra* note 12, Art. 3.

29. Treaty of the European Union on the Functioning of the European Union art 101(3), Oct. 26, 2012, O.J. (C 326). Please also note that for an agreement (clause) to infringe on Article 101 TFEU, it needs to *appreciably* restrict trade between member states of the European Union.

30. Cour d'appel Caudalie/eNova (July 13, 2018) 17/20787.

31. *Id.*; Cour de cassation (Sept. 13, 2017) (*Caudalie/eNova*), 16-15067.

32. Matthew Newman, *Luxury Brands' EU Court Win Shifts Fight over Online-Sales Ban to National Authorities*, MLEX MARKET INSIGHT, (Dec. 6, 2017), <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/europe/luxury-brands-eu-court-win-shifts-fight-over-online-sales-bans-to-national-authorities>.

33. *Competition Policy Brief*, EUROPEAN COMM'N (Apr. 2018), <http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf>.

34. Case T-234/01, *Andreas Stihl AG & Co. KG v E.U. Intellectual Prop. Office*, ECJ (2003) ECR II-2867.

35. *Id.*

to protect the brand image.³⁶ Stihl demanded hand-delivery of this type of product by the distributor to the buyer, and therefore the court concluded that imposing a collection from the dealer, or a delivery to the home of the buyer, disproportionately limited competition because hand delivery is not required by any national or European regulation concerning the marketing of the products in question.³⁷ The latter ruling seems to grasp back to the *Pierre Fabre* ruling on indirectly limiting Internet sales of the retailer.

In sum, while there is clarity at EU level, in some jurisdictions the outcome still seems somewhat uncertain or even contradictory to the European Court's and certainly the European Commission's position. Agreements should be carefully crafted in the relevant economic and business context to ensure that the lawful protections are included, but not to overstep the legal boundaries in order to not violate competition laws.

II. Integrated Marketplace

Today customers use mobile devices, desktops, radio, television, and other channels to stay connected with the world around them. These are also the ways in which they hear about and purchase products and services. But each channel has unique demands for messaging and connecting with prospective clients. To survive, retailers today need to understand the relationships between all of their digital and physical channels and create a seamless, omni-channel brand experience. Delivering great omni-channel experiences builds trust for the brand, deepens brand loyalty, and increases the lifetime value of products in the view of customers.

People do not walk into a retail store to find their next look. They turn to their social media feeds to see what is happening around them with friends, or with people or brands they admire. Buyers expect highly personalized and consistent shopping experiences at every touchpoint. Whichever channel the customer uses, the experiences should be high quality and consistent among all channels. A smooth functioning of interconnected sales channels requires a tailored legal solution.

What are the risks and the profit models of the integrated marketplace as it exists today? The business can use terms like "click & collect," "drop ship," "buy online return in store," or "inventory sharing" to promote cooperation between suppliers and retailers in serving the consumer when and where he or she wants it. But what are the legal implications, if any of these revised business models?

Let's start with a simple click and collect example. The consumer orders online with the supplier on its website, but indicates that he or she wants to pick up the product in the nearest brick and mortar store. This happens to be a mono-brand store operated by an independent retailer under a license

36. *Id.*; see also Case C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, ECJ (2017).

37. Case T-234/01, *Andreas Stihl AG & Co. KG*.

from the supplier. The agreement between the retailer and the supplier therefore needs to include provisions ensuring that the retailer will (1) provide service to the consumer regarding any orders placed with the supplier by maintaining these products in inventory when dropped off by the supplier; (2) handle the consumer in the store; and (3) offer the products, along with any relevant product details or explanations, packaging, and payment, if that was not already taken care of online. This will cost the retailer time and money, and he or she will expect compensation, perhaps on either a fixed or variable service fee. Because this concerns aspects of the performance of the contract between the supplier and the consumer, but not the contract execution itself, it could be viewed as subcontracting or outsourcing certain tasks to the retailer. Under Dutch civil law for example, it would be an agreement of ‘assignment;’ in other words, services.³⁸ While much of this is governed by statutory law, very few rules are mandatory, and it usually does not get very complex, provided that the retailer wants to engage in this model.

Slightly more complex, at least in the European Union, is the situation where the supplier asks the retailer to place a touchscreen in its store that allows the consumer to directly order products from the supplier’s website that the retailer does not have on display or in its inventory. The question arises whether this qualifies as commercial agency under the EU Directive on the coordination of the laws of the Member States relating to self-employed commercial agents (Commercial Agency Directive).³⁹ As transposed into national laws in the EU member states, a commercial agent is a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of a principal and is remunerated therefor, or to negotiate and conclude such transactions on behalf of and in the name of that principal. But is offering a screen in a store really the same as providing intermediary services resulting in leads within the meaning of the Commercial Agency Directive as transposed into national laws in the various EU member states? If the Commercial Agency Directive is applicable, it contains a range of mandatory requirements, including ones focused on goodwill compensation, requirements that cannot be contracted away from by inserting a choice of forum for a foreign law.⁴⁰ The risks of such an arrangement for the supplier may go well beyond its expectations. And the retailer may be surprised with the amount of pick-ups it has to facilitate or by the space that the products will take in its stockrooms if consumers are late in picking up their orders. Payment on the moment of pick up (rather than on the moment of making the purchase) may not be ideal for either party, because it will offer less incentive for consumers to actually speedily pick up what they ordered online. In the European Union, mandatory rules protect the right of the consumer to give back a product bought online for

38. Dutch Civil Code, art. 7:400 [hereinafter DCC].

39. Council Directive 86/653 of Dec. 18, 1986, on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. (L 382/17).

40. Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Techs. Inc.*, ECJ (2000) ECR I-9305.

reimbursement of the product price.⁴¹ Some exceptions apply, but few are relevant to the fashion and luxury products industry. The retailer may, therefore, also be asked to handle these product returns (in addition to defective products), which may add on to its required tasks.

To get products to the consumer when and where he or she wants it, warehousing and logistics are a critical factor. This includes the time that products spend in stockrooms of the distributor or retailer. In the past decade, a range of so called “inventory management” models has been developed. For example, in franchising networks, it was already common to use directed assortment and auto-replenishment programs that are aimed at assisting the retailer in offering products that best fit the target audience and location of the store. These programs will already reduce inventory, product leftover, and product returns, as well as increase efficiencies.⁴² Real time “inventory assist” apps are developed and offered both to consumers and to stores to assess if a product is in inventory with the retailer and, if not, to identify the closest place it is in stock or to buy it online.

Inventory sharing models go even a step further. Suppliers may assist retailers by placing product with the retailer without actually selling it. If sales are slower than expected in one location, the supplier can move to pick it up and place it elsewhere in the market where there is a higher demand for it. In this so-called “consignment stock” setup, the sale is made by the retailer, but the account and risk of the supplier are linked directly to the consumer. Title and ownership shift directly to the consumer. Variations occur, such as where the retailer acts in his own name or in the name of the supplier. Some of these structures may qualify as commercial agency, to which mandatory rules apply.⁴³ In addition, there may be consequences under applicable tax laws (in particular but not limited to Value Added Tax (VAT)) shifting from a resale model to a consignment stock model.⁴⁴ It is very important to carefully draft agreements that include clear roles and responsibilities, such as the risk and insurance of the products held in stock by the retailer for the supplier. Contract drafters must also describe in the agreement the precise responsibilities the retailer has to market and sell the stock, since it will have less incentives to make sales if it can just ask the supplier to pick up the product if the retailer cannot sell it. Some concept stores are so “high end” that new brands or brands slightly falling down in popularity may not be able to negotiate immediate sales of the products, but

41. Council Directive 2000/31/EC of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) 2000 O.J. (L 178); Council Directive 97/7/EC of May 20, 1997, on the protection of consumers in respect of distance, 1997 O.J. (L 144); DCC, *supra* note 38, art. 7:46a (Dutch Distance Selling Act).

42. Alfred Angerera, *The Impact of Automatic Store Replenishment Systems on Retail* (Nov. 17, 2005), [http://verdi.unisg.ch/www/edis.nsf/SysLkpByIdentifier/3123/\\$FILE/dis3123.pdf](http://verdi.unisg.ch/www/edis.nsf/SysLkpByIdentifier/3123/$FILE/dis3123.pdf).

43. Council Directive 86/653 of Dec. 18, 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, 1986 O.J. (L 382/17).

44. Although beyond the scope of this article, we point to the importance of compliance with Turnover tax laws such as the Dutch Turnover Tax Act of 1968.

the stores will take their product for display in the store, without any further commitment regarding sales or marketing efforts.

III. Franchising of Fashion and Luxury Products

What are the specific do's and don'ts for fashion franchisors and franchisees in digital commerce and omni-channel? Given the earlier referenced changes in the distribution models with independent retailers, franchise agreements for fashion and luxury products may need to be revised to reflect these changes and to clarify roles and responsibilities. In particular, profit-sharing models, the roles and responsibilities regarding the collection and processing of consumer data, and compliance with increased consumer protection laws will have to be dealt with in the franchise or mono-brand store agreements.

A. Exclusive Territories and Internet Sales

Other changes in store network management are also important. For example, in the digital context, it may no longer be a logical or viable choice to allocate exclusive territories to franchisees. This may vary by region, but given the regulatory setting in the European Union, a trend among franchisors of fashion and luxury products is to no longer allocate a radius around the mono-brand store to the franchisee, because the franchisee must endure competition online anyway. In the European Union, passive sales (including Internet sales) outside of an exclusive territory or customer group cannot be restricted.⁴⁵ Active sales can be restricted, but only when the supplier has reserved the territory or customer group for himself or exclusively allocated to another distributor.⁴⁶ Many suppliers of fashion and luxury products now rely on selective (rather than exclusive) distribution systems, part of which can be the franchise or license agreements with mono-brand store operators. In this situation, sales to retailers outside the system can be prohibited.⁴⁷ Cross sales, such as those between authorized retailers, cannot be restricted, since it would entail market partitioning within the European Union, which is a prohibited restriction by object (cf. a *per se* restriction).⁴⁸ The European Commission and some national authorities have intensified enforcement activities of vertical restraints in recent years and in the context of the e-commerce sector inquiry.⁴⁹ In particular vertical price fixing, Internet sales restrictions, and restrictions on cross-border sales between EU member states have been

45. See Commission Guidelines, *supra* note 14, at 19.

46. *Id.*

47. *Id.*

48. Treaty of the European Union on the Functioning of the European Union, art. 101, Oct. 26, 2012, O.J. C 326.

49. Report from the Commission to the Council and the European Parliament: Final Report on the E-commerce Sector Inquiry, EUROPEAN COMM'N, at 3 (Oct. 5, 2017), http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

on the enforcement agenda over the last few years.⁵⁰ So understanding and properly drafting territorial restrictions and limitations, or selective distribution policies and contracts, are critical.

B. *E-commerce and Omni-channel*

E-commerce and omni-channel have had a major impact on the retail landscape in general and franchise systems in Europe (as well as the wider EMEA region). For brand owners and suppliers, it is critical to improve their logistics to get the product to the consumer faster, where the consumer wants it.

A key question for franchisors worldwide is whether and, if so, how they can involve their franchisees in their online activities. As stated earlier, in the European Union it is not an option for most franchisors to fully control the online marketing and sales activities of their brands and franchise networks. Franchisees have the freedom to set up their own websites. As a result, there is a chance of conflict between franchisors and franchisees regarding e-commerce. The genesis of most of these conflicts is the franchisor's website, if it competes directly with the franchisees. Franchisees often claim a share of the earnings made online by the franchisor. Some franchise disputes, such as in department store chains, concern the franchisor's online offering of products or services with delivery service. Franchisees claim that this is a violation of their exclusive rights in an area or radius around their franchise store or that they otherwise should be rewarded in a more balanced way.⁵¹ Online orders made on the website of the franchisor can be picked up (and sometimes paid) by consumers in a physical store of the franchisee. Moreover, in luxurious fashion chains, it is now possible to order products online in the store, directly from the website of the franchisor (often if the physical store of the franchisee does not have the specific product in stock). At that moment, the franchisee is a "commercial agent" for the franchisor and can be paid a commission for this sale.⁵² To regain control over brand image, reputation, and pricing of products, some franchisors have implemented "genuine" agency models or commissionaire models to replace existing franchise networks in Europe.⁵³ From the guidelines to the EU Vertical Block Exemption Regulation, it follows that certain types

50. See, e.g., European Commission Press Release, Antitrust: Commission Fines Four Consumer Electronics Manufacturers for Fixing Online Resale Prices (July 24, 2018), <http://europa.eu/rapid/press-release>. This decision is also interesting because pricing algorithms and price monitoring tools are mentioned in the discussion.

51. In the Netherlands department store chain Hema, beauty chain Kruidvat, and other franchisees are involved in disputes with their franchisor on the use of websites.

52. Martine De Koning & Hester De Vries, *Wat is de Impact van de Algemene Verordening Gegevensbescherming van de EU op internationale franchiseovereenkomsten*, 2018 CONTRACTEREN 1, 21 (2018).

53. Commission Regulation 330/2010 of Apr. 23, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical Block Exemption Regulation), O.J. (L 201); see also generally Commission Guidelines, *supra* note 14.

of agency fall outside the cartel prohibition.⁵⁴ This exemption applies if the agent is sufficiently integrated in the undertaking of the principal based on the fact that it bears all financial and commercial risks. In this situation, the agreement is a so-called “genuine” agency, and, if the agent acts in his own name, commissionaire.⁵⁵ The supplier may then maintain the resale price and determine the other commercial and legal terms applied by the retailer towards his customers.⁵⁶ The supplier may, in “genuine” agency or commissionaire situations, prohibit or keep for himself Internet sales. The agent or commissionaire bears no or only insignificant risks, and he earns a commission for intermediary services that he provides. Clearly, the retailer loses his status as an independent entrepreneur, because he sells for the account of the principal. This provides the supplier precisely the control over the brand and the interfacing with the consumer that it may find crucial to maintain the brand image in the digital market. Of course, the mandatory civil laws on commercial agents may be applicable, depending on the qualification of the agreement.⁵⁷ While commissionaire and other agency models were less prevalent in the market in the past decades, they have been resurrected since the rise of e-commerce and omni-channel.

C. *How to Partner Successfully with Franchisees in a Digital Economy*

Much of the digital revolution is carried out by working side by side with franchisees and other retailers. Sometimes, overcoming the challenges posed by the new economy may cause friction, in particular when control over the direction and vision of the brand or profit models are concerned. To avoid conflicts, franchisors and franchisees should make clear arrangements regarding e-commerce. In particular, the revenue and profit models for the website should be agreed upon and written down in detail in, or as an amendment to, the franchise agreement. For example, it could, in specific circumstances, be a good idea to negotiate that a franchisee gets a commission or service fee for services performed for the franchisor’s direct online sales to customers. Or, in the case of an exclusive territory allocated to the franchisee, the franchisee might receive a part of franchisor’s earnings of online orders of consumers in the territory of the franchisee. Any such arrangements may qualify as commercial agency within the meaning of EU law as implemented in its member states, even if the main agreement is a license or franchise agreement.⁵⁸ Therefore, an analysis of its proper qualification, proper drafting,

54. Commission Guidelines, *supra* note 14, at 5.

55. Art. 1 Council Directive 86/653 of Dec. 18, 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. (L 382/17).

56. Any non-compete clauses resting on the retailer, however, do not merely form the content of the customer agreements and may still foreclose a competitor. These clauses should therefore be properly assessed under competition law.

57. Council Directive 86/653 of Dec. 18, 1986, on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. (L 382/17).

58. Art. 6, Council Directive 86/653 of Dec. 18, 1986, on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. (L 382/17).

and negotiating is helpful, even though some consequences of qualifying as a commercial agency, such as mandatory goodwill compensation, may not be possible to contract away if the agent is situated in the European Union.⁵⁹

IV. The Collection and Processing of Consumer Data

In addition to the complexity of the various business and distribution models, it is now increasingly difficult to determine who “owns” the rights to customer data and who is responsible for the correctness, completeness, and safety of the data.⁶⁰ The strict rules for personal data processing under the General Data Protection Regulation⁶¹ (GDPR) will impact franchise systems, not only within the European Union, but potentially worldwide.⁶² The GDPR applies to processing in the context of the activities of an establishment of a “data controller” or “data processor” in the European Union, regardless of whether the processing takes place in the European Union or not.⁶³ A “data controller” is the natural or legal person, public authority, agency or other body that determines the purposes and means of the processing of personal data,⁶⁴ while a “data processor” means the natural or legal person, public authority, agency or other body that processes personal data on behalf of the data controller.⁶⁵ Moreover, the GDPR applies to the processing of personal data of data subjects who are in the European Union by a controller or processor not established in the European Union, where the processing activities are related to (1) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (2) the monitoring of their behavior as far as their behavior takes place within the European Union. This means that only franchise networks that do not have any business units or advertising activity, or individual online sales in the European Union and European Economic Area (EEA) can safely say they do not need to check for compliance with the GDPR and other EU privacy laws. If a franchise network has business units or advertising in the European Union, or just makes individual sales there, even if it is only through the franchisee’s website accessible from the European Union, accepting reservations, or making deliveries of products

59. Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc*, ECJ (2000) ECR I-9305.

60. See, e.g., note 21.

61. Council Regulation 2016/679 of April, 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/1).

62. Council Regulation 2018/302 I of Feb. 28, 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulations No 2006/2004 and (EU) 2017/2394 and Commission Directive 2009/ (Text with EEA relevance.), 2016 O.J. (L 601); see also Martine de Koning, *Europe Reaches Compromise on Geoblocking*, KENNEDY VAN DER LAAN (Dec. 22, 2017), www.kvdl.com.

63. General Data Protection Regulation, *supra* note 61, art. 3(1).

64. *Id.* art. 4(7)n.

65. *Id.* art. 4(8).

or services to data subjects in the European Union, it is very likely that the GDPR is applicable to the franchisor or franchisee. Since violations of privacy laws by a franchisee can seriously harm the reputation of the brand, and thus affect the franchisor and the entire franchise network, franchisors also need to take account of a franchisee's activities in the European Union, even if the franchisee is only accepting reservations or orders for products or services online

To comply with the GDPR, franchisors and franchisees must map the data processing in franchise systems.⁶⁶ This data processing may include client data (whether the client is a consumer, guest, or patient), employee data, and personal data relating to individuals visiting the premises and third-party service providers.⁶⁷ Who will determine the purposes and means of data processing and thus will act as the data controller? Where will data rest? Which data will flow between the parties? How long will data be kept and who exactly needs access to data? Knowing the answers to all of these questions is of critical importance.

It is recommendable for franchisors and franchisees to clearly define all of these questions in their agreements. It is also important to align reality with what is stated in the agreements and other documentation. If the franchisee will act as a data processor—processing data on behalf of the franchisor—the franchise agreement must include processor clauses, meeting the requirements under the GDPR.⁶⁸ If both parties act as joint controllers, they also must make an arrangement to determine their responsibilities for compliance under the GDPR.⁶⁹ In our experience, most standard franchise agreements have used internationally require substantial adaptation to meet the requirements of the GDPR.

Contractual arrangements are of key importance to claims brought by any data subject, (i.e., the person whose data is processed). Any data subject who has suffered damage (material or non-material) as a result of infringement of the GDPR has the right to compensation from the data controller (or data processor if it defaulted in its specific role).⁷⁰ Even if the franchisor and franchisees are not exempt from liability towards the data subjects involved, indemnification from the franchisor towards the franchisee (or vice versa, depending on what role each party has) may be included in franchise agreements. The same holds true for sanctions imposed by the competent supervisory authorities. Supervisory authorities may impose high fines of up to €20 million or 4% of the total worldwide annual turnover of the company in the preceding financial year.⁷¹

66. *Id.* art. 5.

67. *Id.* art. 4(1).

68. *Id.* art. 28(3).

69. *Id.* art. 26.

70. *Id.* art. 82(1).

71. *Id.* art. 84(5).

Finally, it is important to realize that there is more to come: the strict rules under the GDPR are expected soon to be complemented by additional e-privacy rules, which will impact usual business operations in franchising, such as consumer profiling, e-marketing, behavioral advertising, and geo-targeting.⁷² Initially, Brussels set forth the ePrivacy Regulation in parallel with the GDPR on May 25, 2018.⁷³ However, the draft ePrivacy Regulation is still being debated, and final adjustments are being negotiated. For international franchising systems, the final consequences for daily practice of this regulation are still unclear.⁷⁴

V. Influencers and Social Media

So-called “influencers,” people who are active on social and in other media, impact the development of luxury brand value. High couture and luxury product manufacturers (e.g., brand owners) use social media in many ways to their advantage. They develop a sophisticated brand strategy for this, and they seek influencers and brand ambassadors to enhance the brand image and the popularity of the brand’s products. Specific target audience groups are defined well in advance, and most brands work with multiple influencers to influence different target audiences. Franchisors also need to take actions to curtail unwanted social media involving their brands by third parties, or by their own multi/mono brand retailers. In particular regarding the latter situation, it is helpful for both franchisors and franchisees to implement social media guidelines.

While there are European rules on advertising, such as on misleading advertising and unfair trade practices, EU laws do not contain specific legislation on influencers and social media. To give an example, there is Dutch law on advertising⁷⁵ and unfair trade practices,⁷⁶ which is largely an implementation of EU law. Most of the rules are based on the principle that advertisements may not be misleading. For a few years now, several jurisdictions have adopted national laws and/or practices on the permissibility of social media influencing. In the Netherlands, for example, the Advertising Code Committee has introduced a system of self-regulation—the Dutch Advertising Code⁷⁷—and one of its sub-codes applies to influencing.

72. Proposal for a regulation on concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) COM(2017) 10 (Jan. 10, 2017), <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications>.

73. European Commission Press Release IP/17/650, Commission Proposes High Level of Privacy Rules for All Electronic Communications and Updates Data Protection Rules for EU Institutions (Jan. 10, 2017), http://europa.eu/rapid/press-release_IP-17-16_en.html.

74. *Id.*, n.25.

75. *See, e.g.*, DCC, *supra* note 38, art. 6:194.

76. *See, e.g.*, *id.* art. 6:193a–j.

77. Dutch Advertising Code, *available at* <https://www.reclamecode.nl/nrc/pagina.asp?paginaID=0&deel=2> (in Dutch).

The Advertising Code Social Media⁷⁸ contains a self-regulation on social media advertising. Often an advertiser (for example, the brand or the manufacturer) asks the distributor (the blogger or influencer) to present its products in exchange for a financial compensation or other advantage. This is called influencer marketing. According to the Advertising Code Social Media, it must at least be clear that the post is an advertisement. In the case of a “Relevant Relationship,”⁷⁹ the advertisement must be recognizable, and the distributor must state the compensation received.⁸⁰ Sometimes it is unclear whether the blogger or influencer received actual remuneration due to the advertisement, or whether a product or brand is actually coincidental with the advertisement. In the first case, the influencer must explicitly mention the connection, either by using hashtags, such as #spon or #adv., or by literally saying that a specific product has been received from the brand. Article 3 of the Advertising Code Social Media offers suggestions for clearly identifying the content and nature of the Relevant Relationship.

The Advertising Code Committee supervises the Advertising Code Social Media. The Committee only acts on the basis of complaints. On November 17, 2015, after a complaint against three bloggers and the watch brand Daniel Wellington,⁸¹ the Advertising Code Committee ruled that, despite the absence of the suggestions presented in the Advertising Code Social Media, it still concerned advertising. The business relationship in this case was unmistakably clear because of the layout and presentation of the blogs and therefore fell within the scope of the Advertising Code Social Media.

VI. High Fashion and the Need for Speed

Digital opportunities create the need for speed to meet consumer demand, a trend that is aptly called “velocity” in the fashion industry. An important development that affects the high fashion industry is the fact that the traditional practice of two high fashion collections per year is under pressure. The desire for high velocity and high turnover is forcing manufacturers and retailers to adapt by rethinking their manufacturing processes and supply chains.

Consumers can check online every day for new products that he or she may want to buy, and many websites are now willing to cater to this demand, making fresh new products available on a daily basis, putting pressure on brands to continually change product offerings. Social media encourages the

78. Dutch Advertising Code Social Media, available at <https://www.reclamecode.nl/nrc/pagina.asp?paginaID=289%20&deel=2> (in Dutch).

79. Art. 2(d) of the Dutch Advertising Code Social Media defines a “Relevant Relationship” as the relationship between the advertiser and the media disseminating the content that is targeting the advertising through social media and receiving payment or any other benefit which could influence the credibility of advertisement through social media.

80. Advertising Code Social Media, *supra* note 78, art. 3.

81. Advertising Code Committee, Decision of Nov. 17, 2017 (*Daniel Wellington*), <https://www.reclamecode.nl/webuitspraak.asp?ID=147618&acCode> (available in Dutch).

mentality that once an outfit or item is shared with the public, it can never be worn again and photographed. The problem with this psychological shift is that most people cannot afford to buy a high-end item and only wear it once. Fast fashion retailers are seeing the benefits of these trends' shorter life cycles because it is resulting in people constantly looking for a product to satiate their moment of inspiration. By nature, the manufacturing lead times for developing and manufacturing products are longer for high couture brands than they are for their fast fashion counterparts.

High couture brands have responded in various way. In other sectors of the fashion and apparel industry, more collections per year and flexible ordering have long been in place. There are some trends in "high couture" for changing the pace. Some high couture brands have resisted this trend in order to maintain quality and reputation. The trend of more collections per year has a major impact on how to market, sell, and distribute products. It can negatively impact the brand image and high quality reputation high couture brands have spent so long cultivating. Other high couture brands have more readily embraced changing marketplace. These innovators have explored cooperation for particular collections with cinema, music, and fashion or sports celebrities, bringing dedicated and specifically branded products to the public to stay "relevant" online. Another distinct response is the mixing of high couture with "fast fashion." Some high couture brands have developed and sold specific "fast fashion" collections with brands like H&M, and other "fast fashion" champions. High couture no longer leads what is worn in the streets. Street wear quickly makes it into trends and into the high couture. The high couture retail year, with distinct seasons and four or five major inventory turns, is now generally believed to be a thing of the past for retailers and brands.⁸²

The "see-now-buy-now" culture has also impacted the manufacturing supply chain and sales organization of high couture and other fashion brands. Traditionally, the industry works with pre-ordering and manufacturing cycles of at least six months. Most manufacturing is done overseas, in Asia. Therefore, additional time is needed for packaging, shipping, unloading, and delivery to warehouses of distributors or directly to owned stores, retailers, or direct sales channels. Velocity means that couture brands must have overseas factories engage in faster production, without compromising on quality. Brands also engage more directly with fabric and trim manufacturers, more often buying directly from them, and placing "bufferstock" with manufacturers. This means taking the ownership and risk earlier in the process, thus encompassing the financial risk of these materials not being used or not fit for the end product.

82. MCKINSEY & CO., *THE STATE OF FASHION* (2019), <https://www.mckinsey.com/~media/McKinsey/Industries/Retail/Our%20Insights/The%20State%20of%20Fashion%202019%20A%20year%20of%20awakening/The-State-of-Fashion-2019-final.ashx>; JO ELLISON & KARL LAGERFELD, *THE CRISIS IN LUXURY* (Feb. 25, 2016), <https://www.ft.com/content/94b54892-dbec-11e5-98fd-06d75973fe09>.

Similarly, capacity booking systems are usually software tools or other information technology systems that help with (monthly) production planning to maximize the profit of retailers. The bookings for production lines and manpower in production factories are conducted in advance based on a demand prediction and production planning. These capacity booking systems seem attractive for manufacturers and brands, but also increase the risk for the brand that the factory is booked in advance, all personnel and machines standing still if there is a problem with the designs, the fabrics, and other materials used. All of these changes require a different way of working, and an understanding with the manufacturers that time and quality is of the essence. Some factories overseas are not used to working based on long and complex contracts, while some can adapt to a very different way of working.

Most truly high couture brands have a long tradition of manufacturing in smaller quantities, closer to home. Interestingly, more brands have moved certain manufacturing processes closer to home, to avoid shipping time and to have more control over the manufacturing process and quality of the products. The importance of termination clauses in contracts cannot be overstated because a move to a new factory may have to be swiftly executed, or certain fall-back options may have to be used more often in the current digitally driven landscape. There is also a distinct impact on the sale and distribution of high couture—think of capsule collections,⁸³ corner stores,⁸⁴ and pop-up stores.⁸⁵ Today's retailers must be agile and flexible to stay relevant. Special agreements are needed not only for the operators of such stores, but also to make sure the agreements are fit for the situation at hand and not overly complex. If anything, it adds another sales channel in often already layered multi-tiered distribution and retailer or franchisee networks. Maintaining control of the brand and the brand's vision and image remain key to success, and this requires a lot of resources to manage, such as policing the Internet for counterfeit and genuine products brought onto the market without the trademark holder's permission from outside the European Union.

V. Conclusion

New technologies and digital markets impact the online sale of fashion and luxury products globally. In this sector, suppliers often use multiple distribution channels, of which franchise or licensed monobrand stores form

83. A capsule collection features only the most essential or influential pieces from a collection. A capsule collection is often limited edition, which transcends seasons and trends by being functional—read commercial. They often focus on construction and delivering key looks and are used by fashion retailers to break seasonality as an alternative to fast-fashion.

84. A corner store is a small retail business that stocks a range of everyday items for convenience purposes.

85. A concept store is a retail format that integrates apparel, homeware, bookstore, gallery, and restaurant under a consistent brand personality and visual merchandising. The goal of a concept store is to stay away from mainstream fashion as much as possible.

an important part. Having multiple sales channels in place means there is a need to continuously assess the positive and negative impacts, both commercially and legally, of one channel on another, and to address any issues that arise. Digitalization has truly transformed and further complicated this retail environment. It creates a stronger focus on technology and on a clear brand strategy that is aligned across all channels, both digital and physical. This is even more true regarding the integration of traditional physical and new digital channels, the so-called omni-channel. To survive, retailers today need to create a seamless, omni-channel brand experience. This needs to be aligned across owned retail and franchised or licensed retail locations, both online and offline.

Profit models of integrated marketplace bring commercial opportunities but also new risks and legal implications. Data and technology play a much larger role in business than ever before. The more detailed information a party has, the better the party can customize and design its products, services, and brand strategy to what consumers really want, thus increasing its success. Especially in Europe, where there is a tight framework of law in which to operate, it can be challenging to navigate the waters. Competition law also plays an increasingly important role. In owned channels, pricing may be aligned between outlets, but in franchised or licensed channels, the supplier may not influence the retailer's pricing and discount strategy. Suppliers may not prohibit internet sales with perhaps the exception of internet platform restrictions. To maintain control over brand positioning, and to avoid free riding by (pure online) retailers that may not invest as much in quality and service, brand owners increasingly feel the need to protect the luxury image of their products and to keep control on the quality of their goods and service delivery through, for example, selective distribution. However, not every franchise or license system of stores meets the criteria of selective distribution, and having selective distribution in place also provides additional regulatory complexities, such as the need to allow at all times cross-sales between members of the network.

The desire for both high velocity and high turnover is forcing manufacturers and retailers to adapt by rethinking their manufacturing processes and supply chains. Revised business models may change aspects of the performance of the contracts between suppliers, retailers, and consumers. For franchising, the changes in digital commerce and omni-channel therefore mean that franchise agreements may need to be revised to reflect the changes and to clarify roles and responsibilities. In particular, agreements should address profit-sharing models, roles and responsibilities regarding the collection and processing of consumer data, and compliance with increased consumer protection laws and competition laws on vertical restraints and horizontal data sharing (if the supplier is also active at retail level). To avoid conflict, franchisors and franchisees must define their roles, properly qualify their agreements, and make clear arrangements regarding omni-channel and e-commerce.

