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Consequences of market definition
under competition analysis
- the luxury fashion market -

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Summary

This thesis is dealing with the market analysis under the EC competition rules, more precisely Article 82 of the EC Treaty and the Merger Regulation, and their applicability to a specific market. The chosen market is the luxury fashion market. This market is of interest because it has gone through dramatic structural changes in the last ten years: from being a market with many small and family-run fashion houses, it has by way of mergers and acquisitions turned into a lucrative and concentrated market dominated by few big conglomerates, so called fashion groups. Furthermore, it has not yet been fully appraised by the Commission of the European Union.

The Commission has so far not made a precise market definition regarding luxury goods and luxury fashion. Nonetheless, the general principles used in competition cases to define a relevant market in terms of products and geographic area, can be applied to the luxury fashion industry. The result may be a Community wide market of luxury fashion products that is separate from other luxury products. A precise market definition makes it possible to identify characteristics of the market and to outline what actually constitutes market power in this particular market. This is the key issue in the analysis of the competitive situation in a market.

Apparent when considering the luxury fashion market, is that market share is not the only factor that may indicate market power. Strength and power in this market stem from the status of a must stock brand and the advantages of a broad portfolio paired with the resources and capacity for advertising activities and the control over distribution. Power in the luxury fashion market may be used to dictate market conditions through distribution arrangements. By way of linking the sale of one brand to the sale of another brand as well as binding the retailer to full ranges of products, the commercial freedom of retailers may be restricted and actual and potential competitors may be foreclosed.

It is obvious that the situation and the conditions in the luxury fashion market have changed due to recent years' acquisitions. Defining a luxury fashion market and identifying its characteristics clarifies that the market situation is to a certain extent dictate by a few companies and that there is some degree of market power. In this thesis there will be no final conclusion on whether this market power amounts to dominance according to Article 82 and the Merger Regulation. Yet, even if there is no actual dominance in the luxury fashion market, the acquisitions may have affected the degree of workable competition in this market.

In fact, placing too much emphasis on market dominance may hinder competition concerns from being captured when analysing a market. If instead directing the appraisal towards the economic behaviour, such as the incentives for the companies to engage in various business strategies, it would possibly make the competition analysis more focused on whether there is and will remain a workable competition in the market. The assessment of an acquisition would be more concerned with the effects likely to result from the operation in terms of potential reduction in competition. This

may be described as placing the focus on firm behaviour, the intensity of potential competition and the sources of profitability. It is possible that this would lead to a more complete description of the competitive harm an operation may cause and therefore to anti-competitive behaviour being better captured. This would not only make the actual competitive situation and potential competition concerns in the luxury fashion market more visible, but it would also be in line with the competition policy.

1 Introduction

1.1 Background

During the past ten years the fashion industry has developed, it has gone from a merely cultural and social phenomenon to a multi-billion industry. Fashion is today a highly competitive industry where designers and fashion houses no longer can rely on their brands' history.

The trend that has turned the fashion industry into a lucrative business is the creation of multibrand luxury fashion groups. A few companies have during the past years acquired the main part of the existing designers and fashion houses. Large investments have been made in advertising and marketing campaigns, turning family names into global brands. As fundamental as individualism, artisanship and innovation were to the traditional designers and fashion houses, as important are today branding, marketing and growth to the fashion groups. The structure of the industry has radically changed: from many small family-run fashion houses to few large fashion conglomerates.

The acquisition trend in the luxury fashion industry has not yet caused the Commission of the European Communities to take any action. So far the Commission has not considered it necessary to make a thorough assessment of the fashion industry. Nonetheless, considering the dramatic structural changes, my believe is that this is an industry which qualifies for a closer examination.

1.2 Purpose and method

The purpose of this thesis is to examine the EC competition rules and show how the rules may be applied to the luxury fashion industry. The luxury fashion industry has been chosen as an example industry and I have focused on Article 82 of the EC Treaty and the Merger Regulation.¹

The thesis begins with a general description of luxury goods and luxury fashion in order to present the industry that will be the subject of this thesis. Thereafter the overall structure of the European competition rules and policy is described. Although the thesis deals with Article 82 and the Merger Regulation, I have chosen to in short describe Article 81 of the EC Treaty as well. The reason is the close relationship between especially Article 81 and 82, but also with the merger control within the Common market.

After the presentation of the luxury fashion industry and the legal framework, the next issue is the definition of a relevant market. In accordance with the general principles used in assessments of competition cases within the Common market, a relevant

¹ Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

market for the luxury fashion industry is outlined in terms of products and geographic area.

A defined relevant market is the starting point for any competitive analysis. It is thereafter possible to appraise the compatibility of the situation in the market with the objectives of competition policy and the competition rules. The question is how a competitive assessment of the concerned relevant market would look. The focus is on the identification of those factors that are of relevance for market power and strength in this specific market, and therefore may influence the market structure. Furthermore, the discussion in this thesis intends to point out some potential effects that may be the result of market power in the concerned market: within Article 82 by means of abusive behaviour, respectively within the Merger Regulation by means of altered market structure.

The thesis is in part descriptive and in part analytical. In order to analyse how the competition rules may be applied to the luxury fashion industry, both the competition rules and the industry in question are presented and described.

The luxury fashion industry is an industry that has not yet been fully appraised. This is reflected in the sources available. There are little if any literature on luxury goods. I have used general doctrine and reports from mainly the Commission as well as case law concerning other branded markets. This material has been compared to articles in journals and from websites about luxury fashion.

Regarding the conditions on the market, I have been in contact by mail with the designer Marcel Marongiu and by phone with Annika Elofsson, buyer at Paul&Friends NK/Stockholm.

Information on the different fashion groups and fashion houses has been found on websites and in company overviews.

1.3 Delimitations

The description of the legal framework concerns exclusively Article 81, 82 and the Merger Regulation and it is in the form of an introductory presentation. Extending the presentation to other parts of EC competition law in a more penetrating fashion would make this thesis too extensive. Therefore, fundamental knowledge in the field of EC law will be assumed.

Article 81 will only be described in relation to Article 82 and the Merger Regulation because of its complementing function. It will not be applied to the luxury fashion industry, since that would appreciably broaden this thesis. Instead, I have chosen to limit the thesis to Article 82 and the Merger Regulation and to focus on market power.

In the description of the market and the fashion groups and fashion houses, I have been limited by the available information. This is reflected in for instance that market shares will not be calculated in this thesis. Moreover, I do not have the means to in detail investigate the conditions and obligations used in relation to different market players. I will therefore suffice by describing potential situations using the information I have obtained from interviews and articles.

2 Luxury goods

A luxury product may be defined as a high quality product, sold at a high price and marketed under a prestige brand name.² The nature as a luxury product ultimately derives from an aura of exclusivity and prestige distinguishing it from products that otherwise have similar use. This aura is in the consumer's mind associated with the brand under which the product is sold. The exclusivity of the brand is then reflected in the originality and sophistication of the product's creation, the qualitative level of the materials used and the marketing of the products.³

There is no precise definition of what actually constitutes a luxury product. Luxury goods consist of several types of different products.⁴ This is illustrated by the following figure:

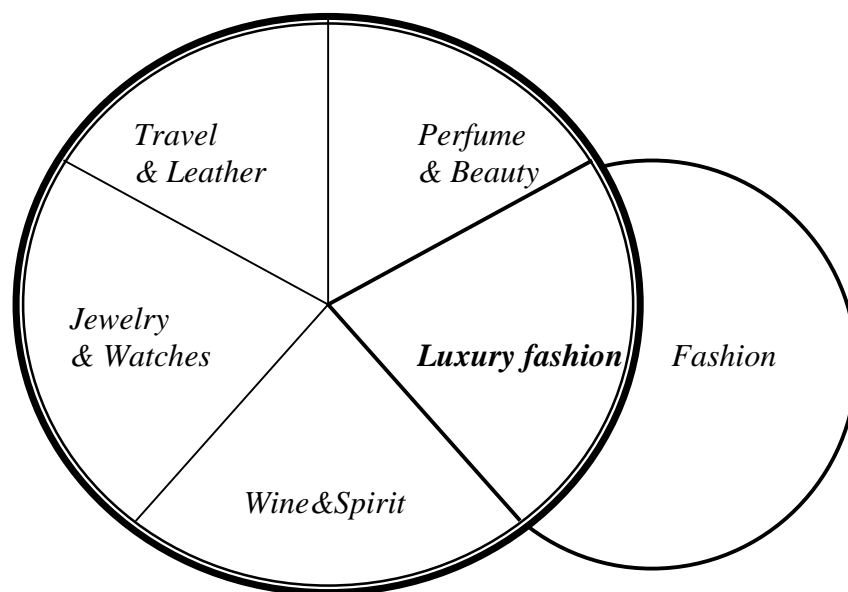


Figure 1

The circle symbolises all luxury goods. The different types of luxury goods have, in this case, been divided into five separate segments. The luxury product segments form part of different overall product sectors.

For example: The luxury fashion segment is part of the overall fashion sector. The overall fashion sector consists of a luxury fashion segment (described below) within the boundaries of luxury goods and one fashion segment (i.e. low price designer clothes) outside the luxury goods boundaries.

² Definition by the Commission in Case No.IV/ M.1534 Pinault Printempa Redoute/Gucci.

³ Case No IV/33.542 Parfums Givenchy, Case No.IV/33.242 Yves Saint Lauren Parfums.

⁴ See for ex Media Invest *Consolidation in the Fashion and Luxury Industry* and www.lvmh.com.

2.1 Luxury fashion

The luxury fashion industry produces a variety of products. These fashion products are all part of a fashion collection and intended to represent the image of the brand under which they are launched. The fashion house or the designer presents a new collection twice a year, i.e. spring/summer and fall/winter. The collection consists of one or several clothes-lines. A clothes-line may include everything from designer stockings to evening dresses. Furthermore, a collection in general includes shoes, handbags, belts, scarves and sometimes sunglasses, all complementing the clothes-line.

All the fashion products in a collection are designed to accentuate an image, that is the image of the collection and the brand. Each individual product signals the general brand image and at the same time it is part of an unity, the collection, symbolising a more specific and personal image or look.⁵ There is a clear connection between the different fashion products, since they match each other as well as they match the brand image.

Thus, characteristic of luxury fashion is both brand image and design, i.e. an aura of prestige and exclusivity together with the look of a specific collection. A fashion article is more than just the actual product; it is a reflection of an image and of exclusivity. As much as the product has a practical function, it has a symbolic function to the consumer. The value of fashion articles is to be found in the design coupled with the image they project. As Patrizio Bertelli, the CEO of Prada, has said about fashion: “It is things that have an attitude”.⁶

2.2 The creation of luxury goods

The characteristic of luxury goods is dependent on the producer’s capacity to develop and maintain a reputation of high quality and exclusive image. Advertising and marketing are important tools in the building of such a reputation. Advertising generates a public image and public loyalty. Appropriate marketing brings out the specific aesthetic quality of the product and strengthens the exclusive image. Therefore, the investments in advertising and marketing bring value to the product, the value of being a luxury product.⁷

Brands play a crucial role in the development and promotion of luxury products. A brand enables the brand owner to individualise the business and its products, thus making it possible to build a reputation and to communicate it to the consumers. Through the recognition of the brand the consumer is able to connect the image, the

⁵ An example is the Gucci look, a “rock-star glam look”. The look is each season slightly changed and remodelled, e.g. glamour meets rock-star à la hippie, but always surrounded by a general aura of luxury and prestige and the overall Gucci look.

⁶ Guyon, Janet., *Prada Steps Out* BUSINESS 2.0, www.business2.com/articles/mag/print/0,1643,17163,FF.html 2002-05-19.

⁷ NERA, *Silhouette- Shedding Light on Grey Imports*, Competition Brief no 14 September 2000.

reputation, of a product with the actual product. A brand is therefore a way of identifying products and allowing the brand owner to benefit from the reputation.⁸

Furthermore, the consumer can on the basis of reputation associate a level of quality with the brand, and the product. A brand may thus serve as a symbol of quality. At the same time, it may be a guarantee of quality. The brand guarantees that the product bearing that brand has the qualities the reputation states.⁹

In order to secure the investments in product quality and brand image, the brand owner can register the trademark in accordance with the legislation in Member States governing the system of property ownership or the Council Regulation on the Community trade mark for the EU as a whole.¹⁰ This regulation is an attempt to harmonize the national laws.

The protection under a Community registered trade mark gives the holder an exclusive right to the trademark, and the right to prevent others from using the trademark or a similar trademark that might confuse consumers. The owner is protected against reproductions or imitations of the trademark and has the right to prohibit third parties from using identical or similar signs to that of his trademark without his consent. This protection is extended to goods that are in fact not similar to those for which the trademark is registered, but where the use will take unfair advantage of, or will be detrimental to, the distinctive character or the reputation of the mark.¹¹

2.3 The maintenance of the luxury image

The maintenance of a prestige brand image is an essential factor in the competition in the luxury goods industry. The brand owner has to safeguard in the public's mind the aura of luxury and exclusivity inherent in the product. Hence a key factor for luxury goods, as well as for other branded products, is the capacity to first create and then maintain an original and prestigious brand image.

Since the image of a brand is an irreplaceable asset for the brand owner, it needs to be constantly enriched and nurtured. It is partly through investments in advertising and promotion that the image of a brand is broadened and rejuvenated and its pulling power is built and expanded. Also, distribution is equally important for the purpose of protecting and strengthening brand image. Store aesthetics, a coherent approach and irreproachable service, all contribute to the quality and imagery embodied by the brands and sought after by the consumers. Therefore, investments in both advertising and in distribution are instrumental in keeping brand image up to date and supporting new product launches.¹²

⁸ Bernitz, Ulf. Karnell, Gunnar. Pehrson, Lars. Sandgren, Claes *Immaterialrätt och otillbörlig konkurrens*.

⁹ Korah, Valentine *An introductory guide to EC Competition law and practice*.

¹⁰ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark, recital 5.

¹¹ Article 9 of the Council Regulation on the Community trademark.

¹² www.lvmh.com/finance/12k0039a.htm (2002-04-09).

Brands and brand image clearly have a competitive function. A registered brand, with its trademark rights paired with a strong image, gives the brand owner a certain position on the market. Consumers generally consider products characterised by different brands and image less substitutable.¹³ The trademark protection and the consumer loyalty a strong brand engenders therefore have the effect of placing the brand owner in a more or less protected market position. However, this sheltered position will generally not in itself be restrictive of competition, it is how this position is used or abused that may distort competition in the market.¹⁴ In this respect the Court has made a distinction between the existence, the grant, of the trademark right and the exercise of the trademark right.¹⁵

Under the existence of the trademark right falls an initial right of the brand owner to place the goods on the market through preferred authorised channels. When the brand owner however has proceeded or agreed to market the goods in a Member State, the free movement of the goods in the Community cannot be prohibited.¹⁶ Practise intended to, for example prevent and control the distribution or to in other ways by private means influence the competitiveness of the products, falls under the exercise of the trademark rights. Such behaviour or practise regards the exercise of the rights and it is subject to the European competition policy and will thus be appraised under the Community competition rules.

¹³ Bernitz, Ulf. Karnell, Gunnar. Pehrson, Lars. Sandgren, Claes. *Immaterialrätt och tillbörlig konkurrens*.

¹⁴ *ibid*

¹⁵ Faull, Jonathan and Nikpay, Ali *The EC Law of Competition*.

¹⁶ Article 13 of the Council Regulation on the Community trademark.

3 The competition policy and rules of the European Union

The competition policy is one of the basic policies of the Community. The aim of the competition policy is an effective and undistorted competition in the market, also called a workable competition. A workable competition is the degree of competition in a certain market necessary to ensure the attainment of the objectives of the competition policy and the Treaty of the European Union. The nature and intensiveness of the competition may vary depending on the product and on the economic structure of the market.¹⁷

3.1 Objectives of the European competition policy

One of the objectives of the competition policy is the promotion of consumer interests. An improvement of the overall economic efficiency in the market will give consumers a greater choice of products and services, better quality and better prices. Consumers are therefore amongst the primary beneficiaries of competition policy.¹⁸

Another objective of the competition policy is the protection of smaller firms from large aggregations of economic power, for example in the form of dominance or co-ordinated behaviour by firms.¹⁹ The aim is to prevent the creation or reinforcement of a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the market. The competition policy seeks not to discourage firms from competing but to bring to an end abuses and certain types of behaviour and to control structural changes in the supply of products.²⁰

The competition policy is also concerned with the interest of firms to enter a market, i.e. potential foreclosure effects. A competitive market implies that companies are free to enter the market to compete with existing market players. The competition policy is to ascertain that small and medium sized firms at least have an opportunity to try to enter a market without being devoured by stronger rivals.²¹

3.2 The tools of the Competition Policy

For the purpose of giving force to the European competition policy and to fulfill its aims, Article 3(g) of the EC Treaty provides for the institution of a system ensuring effective and undistorted competition in the common market. Different mechanisms are used in this strategy. Of particular relevance are the anti-trust rules applicable to undertakings: the provisions in Article 81 and 82 of the EC Treaty and the Merger

¹⁷ C-26/76 Metro v. Commission & SABA [1977] ECR 1875, [1978] 2 CMLR 1.

¹⁸ See the Commission XXXth Report on Competition Policy.

¹⁹ Craig, Paul. de Burca, Gráinne. *EU LAW text, cases and materials*.

²⁰ Commission Notice on the definition of relevant market for the purposes of Community competition law.

²¹ Korah, Valentine. *An introductory guide to EC Competition law and practice*.

Regulation.²² These provisions and the regulation are dealing with different aspects of behaviour in the Common market, each with the intention to ensure that competition is not distorted.

3.2.1 ARTICLE 81 AND 82 OF THE EC TREATY

The aim of Article 81 and 82 is to protect fair competition based on the performance of the market participants, however on different levels.²³

Article 82 prohibits any abuse by an undertaking of a dominant position on the common market in so far as it may affect trade between member states.

A prerequisite for the applicability of Article 82 is the existence of a dominant position on the relevant market. A dominant position is a situation of economic power held by a firm, which allows it to hinder effective competition in the relevant market. It places the undertaking in a position to influence the conditions under which the competition will develop in the market and to act in disregard of it.²⁴

Only in the event of dominance in a market, where competition is no longer able to fulfill its control function, is it justifiable to apply the provisions of Article 82. The provisions are intended to compel the dominator of the market to behave as if it were subject to effective competition. From this follows that it is not the dominant position per se that may be subject to the prohibition in Article 82, but the abuse of such a position.

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position. An abusive behaviour influences the structure of a market where the degree of competition is weakened as a result of the very presence of the dominant undertaking. Such a behaviour has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.²⁵

Article 81 prohibits agreements, decisions and concerted practices between firms, which “may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market”.

Article 81 is applicable to both horizontal and vertical arrangements. It is intended to protect competition at all stages in the economic process. It is to ensure that the internal relationship between the undertakings participating in an arrangement is not subject to impairment of competition. Moreover, Article 81 shall ensure that competition develops without constraints in the external relationship between the participating undertakings and undertakings not part of the arrangement in question.²⁶

²² Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

²³ C-6/72 *Continental Can v Commission*, para 24.

²⁴ C-85/76 *Hoffman-La Roche v Commission*.

²⁵ C-85/76 *Hoffman-La Roche*.

²⁶ See for example C-32/65 *Italy v Commission*.

For an arrangement to fall within the prohibition of Article 81, it is therefore sufficient that it impairs the market positions of third parties.

Arrangements by means of which undertakings forego all or part of their freedom of independent commercial activities will affect the competitive conditions in the market. Restrictions on the commercial freedom of an undertaking may therefore fall within the prohibition of Article 81. Commercial activity has been interpreted in the broadest sense, including the right to choose business partners, to conclude contracts and to determine the contents of contracts for a certain period. Furthermore, article 81 guarantees actual existing competition as well as potential competition. Arrangements that prevent, hinder or inhibit appearance of new competitors may consequently be prohibited.

3.2.2 THE MERGER REGULATION

Companies may face various competitive challenges by entering into mergers or acquisitions, which is of course an acceptable business strategy. Yet, care must be taken that market structures after such operations will stay competitive in the future.²⁷ The purpose of the Merger Regulation is therefore to ensure effective control of the structure of competition in the Community. The prohibition in the Regulation concerns the creation or strengthening of a dominant position, which have a significant adverse impact on competition.

The scope of application of the Merger Regulation is limited to concentrations with a Community dimension. A concentration under the Regulation is an operation that brings about a lasting change in the structure of the undertakings concerned. Excluded are thus operations where the undertakings remain independent and the object or effect is the co-ordination of their competitive behaviour. The requirement of a Community dimension moreover limits the scope of the Regulation to operations that go beyond the national border of one Member State and have a significant impact in the Common market. The Community dimension is established by quantitative thresholds calculated on the basis of the turnover of the undertakings concerned.²⁸

A concentration with a Community dimension will be appraised under the Merger Regulation by its compatibility with the Common market. The concentration is to be appraised by the need to develop and maintain effective competition within the Common market. A concentration, which creates or strengthens a position as a result of which effective competition is significantly impeded, is incompatible with the Common market. Such a definition of incompatibility includes two elements. The first element is the creation or strengthening of a dominant position. The second element is the significant impediment of effective competition. There is also a need for a causal link between the two, i.e. the dominant position and the detrimental impact.²⁹

²⁷ Speech by Pons, J-F. *The competition policy of the European Union, its scope and impact on the Member States*, Conference of the Antimonopoly Committee of Ukraine 8/07/1997.

²⁸ Recital 9-11, 23 and Article 1, 3 of the Merger Regulation.

²⁹ Confirmed in the Kali und Salz case (C-68/94 and C-30/95 French Republic and SCPA and EMC v the Commission).

An appraisal under the Merger Regulation is supposed to be directed at a proposed concentration. The assessment is of the situation on the market prior to the operation compared to the anticipated effects of the operation, i.e. an analyse of how the market will be affected. In other words, the Regulation involves a prediction of how the market will generally operate and the players respond and behave if the concentration takes place. This is a great difference when compared to an assessment under Article 81 and 82 of the EC Treaty: while the latter assessment deals with the consequences of passed practise in a market, the former is concerned with the possible future consequences if a certain practise is followed through.³⁰

³⁰ See for ex the Commission Notice on the definition of relevant market.

4 A relevant market

Subject to the European competition policy and rules are practice and behaviour by undertakings in a particular market. The starting point of any appraisal under the competition law must therefore be to define the relevant market within which the competitive situation shall be analysed. The criteria for defining the relevant market are applied generally for an analysis of behaviour in the market as well as for an analysis of structural changes in the market.³¹

The market definition has often a decisive influence on the assessment of a competition case. A market can be defined in a broad sense and include a large number of products and competitors. It can also be defined in a narrow sense, consisting of fewer products and undertakings. The broader the market definition, the less likely that anti-competitive concerns will arise, since the participants will have smaller market shares and less market power than in a more narrowly defined market. Accordingly, in the narrowly defined market, the participants will have higher market shares and greater power to affect the situation in the market.

4.1 Defining a market

The main purpose when defining a market is to find the competitive constraints the company in question meets, i.e. the competitors and the other products that may have an impact on the company and its market behaviour. Firms are subject to three main competitive constraints: demand substitution, supply substitution and potential competition. These three constraints should all be examined and assigned a relative importance.³²

Demand side substitutability is the most immediate and effective competitive constraint on a company. A company cannot have a significant impact on the conditions in a market, if its consumers are in a position to easily switch to available substitute products. Demand side substitutability is therefore the competitive pressure on a company represented by those products that consumers consider as substitutable.³³

Supply side substitution is dependent on the elasticity of the suppliers. The question is whether suppliers are able to switch production to the relevant products and market them in the short term without significant additional costs.³⁴ For supply-side substitutability to influence the definition of the relevant market, it must have an immediate and effective impact on the competitive behaviour of the company in question. This is not the case where there are significant costs and lead times involved, e.g. in terms of advertising and product testing, before the products can

³¹ Commission Notice on the definition of relevant market.

³² Faull, Jonathan and Nikpay, Ali. *The EC Law of Competition*.

³³ Korah, Valentin, *Cases and materials on EC competition law*.

³⁴ Commission Notice on the definition of relevant market.

actually be sold. Supply substitution will then be considered in the competitive analysis instead of when defining the relevant market.³⁵

Potential competition is also a source of competitive constraints but its effects shall not be taken into account when determining the market. Potential competition, as a competitive constraint, reflects the conditions of market entry. An evaluation of the constraining effects of potential competition is therefore dependent on an analysis of factors related to entry barriers.

4.1.1 THE PRODUCT AND GEOGRAPHIC DIMENSION

A relevant market is defined both in its product and geographic dimension. The purpose is to identify the effective alternative sources of supply for the customers of the company in question, in terms both of products and of geographic locations of suppliers. Both demand side and supply side analysis are used when defining those alternative products and suppliers.³⁶

The Commission has defined a **relevant product market** as comprising “all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products’ characteristics, their prices and their intended use”.³⁷ Defining a relevant product market is very much about determining the range of products that may be considered as substitutes by the consumers, and therefore may have an impact on the market behaviour of the company in question.

A relevant market is generally composed of a number of individual products. In order to be regarded as a distinct market the products must however be sufficiently interchangeable. This means that consumers must be willing to switch from one product to another. Moreover, the relevant products must be only to a limited extent substitutable with products that do not fall within the relevant product market.³⁸ In sum, the relevant products must be sufficiently interchangeable and they must have a low degree of substitutability with other products.

A **relevant geographic market** has been defined by the Commission as comprising “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from areas because the conditions of competition are appreciably different in those areas”.³⁹ A relevant geographic market may be defined as national, Community or world wide.

Defining the relevant geographic market is much about analysing demand characteristics in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for the consumers. A relevant geographic market will in general be found to exist where companies enter into competition with each other and where the objective conditions of competition applying to the product

³⁵ Korah, Valentine *An introductory guide to EC Competition law and practice*.

³⁶ The Commission XXXI Report on Competition Policy 2001.

³⁷ Commission Notice on the definition of relevant market.

³⁸ Case 31/80 NV L’Oréal and SA L’Oréal v PVBA, para 25.

³⁹ Commission Notice on the definition of relevant market.

in question are equal for all companies. When this is the case, consumers may be able to purchase the relevant product on similar terms from any company located within the geographic area. All those companies within the defined geographic market may therefore exercise a competitive impact on the undertaking concerned.

When both the relevant product market and the relevant geographic market are defined, it should be determined which products that consumers find substitutable and within which area the consumers are prepared to purchase those products.

5 A luxury fashion market

The latest case, and one of the few in the luxury fashion industry actually notified to the Commission under the Merger Regulation, was the acquisition of joint control of Fendi by Louis Vuitton Moët Hennessy (LVMH) and Prada.⁴⁰ All three companies are active in production and sale of luxury goods, in particular fashion. The notifying parties had argued that luxury goods should be considered a single product market because of substitutability from the demand side. The parties held that the idea of acquiring a luxury good is linked to prestige rather than consumption of a precise item. The argument was mainly that all luxury product segments within the luxury good circle⁴¹ are sufficiently interchangeable.

The operation was found to concern the markets for the production and sale of luxury products. According to the Commission there were no competition concerns because of the existence of numerous players, important competitors and constantly new entrants. Irrespective of the market definition the operation was not considered to create or strengthen a dominant position. For that reason, the Commission did not find it necessary to take a definite view on a more precise market definition. The Commission sufficed by stating that “from the demand-side point of view, luxury products have a low degree of substitutability with other products falling within other segments of the same sector”⁴², i.e. luxury fashion in relation to ordinary, non-luxury, fashion.

Thus, what the Commission said was that the luxury product segments within the luxury good circle have low substitutability with the product segments outside the circle. For instance, a consumer with the intention to buy a pair of Dior jeans would not settle with a pair of Levi’s jeans. Both the characteristics and the reasons behind the purchase, distinguish luxury goods from other, non-luxury, goods. Moreover, the distribution channels used for luxury goods and non-luxury goods are different. In sum, the barriers are too high for the product segments outside the luxury good circle to have any competitive impact on the luxury product segments within the circle.

However, the conclusion is not that all products within the luxury good circle are interchangeable. The Commission has in decisions regarding cosmetic products commented on the distinction between luxury products and in fact defined a relevant market as being one of luxury cosmetic products.⁴³ It should be clear from those decisions regarding luxury cosmetic products, that it is possible to make delimitations within the luxury good circle separating the different luxury good segments from each other.

Defining more specific markets for different luxury goods will result in more concentrated markets with the possibility of higher market shares and market power. In the following part the possibility of defining a distinct and separate market for luxury fashion will be discussed.

⁴⁰ Case No COMP/M.1780 LVMH/Prada/Fendi.

⁴¹ See figure 1, chapter 2.

⁴² Case IV/M.1534 PPR/Gucci.

⁴³ Case IV/33.242 Yves Saint Laurent Parfums, Case No IV/33.542 - Parfums Givenchy.

5.1 The relevant product market

The starting point in the market definition will be to assess whether luxury fashion products may constitute a relevant product market. The question is if those products may form a market separate, not only from fashion products outside the luxury good circle, but also from other luxury products within the circle.

It is not sufficient to limit the examination of a proposed market definition to only the objective characteristics and intended use of luxury fashion products.⁴⁴ In order to be regarded as separate from a wider market of luxury goods, the market of luxury fashion products must be sufficiently homogenous and distinct.⁴⁵ First of all, the characteristics of luxury fashion products must generate a specific demand that makes luxury fashion products only to a low degree substitutable with the other luxury products falling within the luxury good circle. Secondly, the luxury fashion products must be sufficiently interchangeable with each other.

There must in other words be different requirements and different reasons for which consumers might chose a luxury fashion product over any other luxury product. Therefore the structure of demand and supply must, in addition to the product characteristics, be taken into account when defining the market.⁴⁶

5.1.1 DEMAND SUBSTITUTION

Distinction between luxury fashion products and other luxury products

The demand-side substitution depends to a large extent on how the consumer values the characteristics of the product.⁴⁷ It is from the consumer's point of view the products forming a product market must be equivalent. Vital when analysing substitutability is therefore which factors the consumer considers as decisive when purchasing the relevant product.

A luxury fashion product does not only represent a prestigious luxury brand but the looks and values of a specific fashion collection.⁴⁸ Tom Ford, the designer of Gucci, has tried to explain the phenomena behind fashion: "Although a pair of black trousers is a pair of black trouser, when buying a pair of Gucci trouser the consumer is buying into a world. Or more precisely, into the dreams of the designer."⁴⁹

By way of wearing the luxury fashion product, both the brand image and the look of the specific fashion collection are to be reflected on the consumer. This is also the very purpose behind the purchase of luxury fashion: to acquire a specific and very fashionable look in addition to the exclusivity and prestige inherent in every luxury product. Due to such a characteristic combination of a general and prestigious brand

⁴⁴ See chapter 2.1.

⁴⁵ C-27/76 United Brands, para 12-35.

⁴⁶ C-322/81 Michelin para 37, L'Oréal case 31/80 para 25.

⁴⁷ C-22/78 Hugin,

⁴⁸ For example the Gucci look (see chapter 2.1).

⁴⁹ Goldstein, Lauren, *The Guys from Gucci*, TIME.

image and an additional and very distinct image/look of the collection, the demand for luxury fashion is specific and separate from the demand for other luxury products.

Furthermore, the pricing policy for luxury fashion products is without reference to other luxury products.⁵⁰ Also, advertising and promotion of a given luxury fashion product or brand do not have an appreciable affect on other luxury products. Those two circumstances are reflected in that that while sales of luxury goods in general have gone down the last years, sales of luxury fashion have stayed relatively constant⁵¹.

All of this indicates the existence of a distinct market for the luxury fashion products, where designers and fashion houses are able to act with significant independence of the actions of companies selling other luxury goods. There is, in other words, a low degree of substitutability between the luxury fashion segment and other luxury product segments.

The interchangeability between luxury fashion products

In order to form a relevant market, there has to be effective competition between the various luxury fashion products. This presupposes a sufficient degree of interchangeability between those products.⁵²

The different fashion products of a collection might be intended for different objective use. They are nonetheless sufficiently interchangeable to be in a competitive relationship with each other. First of all, the same requirements are behind the purchase of any luxury fashion product. Moreover, the different products in a collection objectify the same image and look. Finally, for the purpose of expressing the image and look, all those products in a collection act as complements to one another.

For example: Although a dress and a poncho from Prada's winter collection obviously have different objective use, they are purchased by the same reasons and for the same overall use as a luxury fashion product. The dress and the poncho are both purchased for their general aura of luxury as well as for the Prada look and the more specific image of the season they signal.⁵³

In addition, it may be argued that although not each and one of the different luxury fashion products are completely interchangeable, they are linked together by a chain of substitution.⁵⁴ For example, a pair of shoes is interchangeable with a blouse and a handbag, but the handbag and the blouse are not directly interchangeable. Nevertheless, all three products do form part of the same product market because of their close connection with each other as part of the same product line. Irrespective of the type of luxury fashion product, they all interact and complement each other.

⁵⁰ Gallagher, Kirsten and Kasdon-Sidell, Louisa, *The big business of fashion*, Clariant 2/2001.

⁵¹ See Grimond, Magnus, European Newswatch, 14/09/2000; Slingsby, Helen, *LVMH hit by luxury losses*, The Guardian, 13/11/2001; LVMH company overview 2001 (www.lvmh.com).

⁵² C-85/76 Hoffman La Roche.

⁵³ See also chapter 2.1.

⁵⁴ See Valentine, Korah *Cases and materials on EC competition law* and Case No IV/M.1571 New Holland/Case.

In sum, as far as the specific use of luxury fashion products is concerned, namely to express and signal an exclusive and fashionable image and look, they are sufficiently interchangeable, irrespective of brand, to form a distinct market separate from other luxury products. If, for example, the spring collection of Gucci was badly received by critics and fashion magazines, the consumer reaction would be to turn to a fashion house or designer with a successful collection. The consumer would happily switch from a Gucci handbag to a Dior handbag, given Dior is what to wear that season. Whereas, the consumer would not buy just any other luxury product, like a Rolex watch or a Lancôme perfume, instead of a product from the “bad” Gucci collection.

5.1.2 SUPPLY SUBSTITUTION

When defining a relevant fashion market it is also necessary to consider the existence of potential producers. These are producers with actual capacity to switch production to luxury fashion and to compete with the already established fashion groups and fashion houses. In this case, the supply-side substitution to consider would be that of producers of other luxury products or producers of ordinary fashion products outside the luxury circle.

It is not possible, without high additional costs and risks, to switch production from other luxury products to luxury fashion products and market them in the short term. This is so because of market specific factors like high brand awareness and brand loyalty. The producer is required to create and position a luxury fashion brand, mainly through a well-designed fashion collection in combination with long-standing and targeted advertising campaigns. Also, the producer has to obtain access to appropriate distribution channels such as exclusive fashion boutiques and fashion corners in department stores. Switching production to luxury fashion products is therefore both costly and time consuming.

For the producers of ordinary, non-luxury, fashion the risk and cost of changing production to luxury fashion are even higher. Those producers have to make investments both in acquiring the reputation as luxury good and in becoming a well-reputed luxury fashion brand. The barriers are thus too high for those producers to be considered as having any disciplinary effect on the luxury fashion industry.

Therefore, the conclusion may be that there is no immediate and effective impact on the competitive behaviour in the luxury fashion industry from producers of other luxury products or from producers of non-luxury fashion products. Since the supply substitution does not have such a direct competitive effect, it will not be taken into account when defining the relevant market. Consequently, the relevant product market that the demand side assessments indicated will not be affected by the supply side, neither in the direction of including other luxury products nor in including ordinary, non-luxury, fashion products.

5.2 The relevant geographic market

In the world of fashion, Italy and France have always been considered as the leading countries. In fact, they still represent a considerable share of the fashion sales and they hold a large part of the small fashion houses, designers, boutiques and factories. However, today the fashion groups and fashion houses are active and account for sales through out the whole Community.⁵⁵

The pricing policy for luxury fashion products is mainly identical in all Member States. If suppliers would be able to charge different prices in different countries, it could be a factor implying a national geographic market.⁵⁶ In this case the prices instead indicate that the geographic market for luxury fashion products is Community wide. This may also be confirmed by the circumstance that, while similar prices are charged in all Member States of the EU, the prices for luxury fashion products are higher in the USA and in Japan.⁵⁷

A relevant factor, when defining the geographic boundaries of a market, is the importance consumers attach to national or local variations, such as brands.⁵⁸

With regard to luxury fashion products, consumer preferences cannot be said to be shaped by national considerations. To a large extent the same luxury fashion brands are represented in all Member States and in general consumers have no preference for national brands. Also, the fashion groups and fashion houses carry out marketing and advertising on Community wide basis.

In addition, consumer preferences in the EU differ from those in the USA and in Japan. Not all designers and fashion houses are established outside the Community and those which are have product lines that are somewhat adapted to the USA or the Japan market. For example Prada has specially designed shoes for the Japanese consumer.

Almost all producers in the luxury fashion industry operate on a Community wide basis. The leading fashion groups and fashion houses are established through affiliated designers and fashion houses in most Member States. The distribution systems of the fashion groups and houses with authorized dealers and directly owned shops cover the whole of the Community.⁵⁹ They also export from manufacturing locations to most Member States. The transportation costs are relatively low and there are no regulatory barriers hindering the exports.

There are no signs that the relevant geographic market for luxury fashion products should be other than Community wide. No barriers isolating the national markets have been identified and both consumer preferences and structure of price are different in the USA and Japan than in the member states of the Community.

⁵⁵ For example LVMH company overview 2001, Gucci Group company overview 2001, Armani annual report 2000.

⁵⁶ Case No COMP/M.2097 SCA/Metsä Tissue.

⁵⁷ Case No.COMP/M.1780 LVMH/Prada/Fendi, para 13.

⁵⁸ Korah, *Valentine Cases and materials on EC competition law*.

⁵⁹ Case No IV/33.542 - Parfums Givenchy.

5.3 Conclusion

The following figure illustrates the conclusions drawn from the assessments of the demand and supply substitutability:

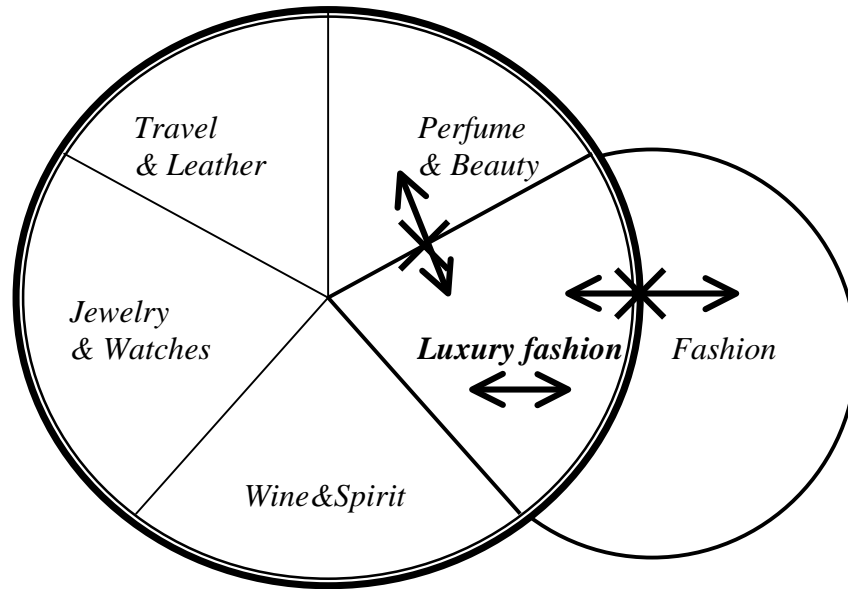


Figure 2

The luxury fashion segment is not substitutable with the fashion segment outside the luxury circle:

There is low substitutability between those two fashion segments because luxury fashion products are in fact a type of luxury good. The very nature of luxury goods generates a specific demand that non-luxury products cannot fulfill.

The products in the luxury fashion segment are not substitutable with products in other segments within the luxury circle:

Luxury fashion has characteristics, which differ from those of other luxury products. Those characteristics make the demand for luxury fashion products distinct and separate from the demand of other luxury products (for example, the luxury Perfume&Beauty products). Consumers do not recognise other luxury products as substitutes, and those products will therefore not have an appreciable competitive impact on the luxury fashion industry.

All products within the luxury fashion segment are interchangeable:

All the products in a fashion collection are intended for the same purpose. They are sufficiently interchangeable, since they compete as well as complement each other.

The conclusion is that the relevant product market is one for luxury fashion products and not one for all luxury goods. This is confirmed by the low substitutability on the supply side. Producers of other luxury products do not have such appreciable competitive effect on the luxury fashion industry to allow the conclusion that all luxury product segments should be grouped into one luxury good market.

The luxury fashion industry is active on a Community wide basis. The leading fashion groups and fashion houses are established in most member state and through out the whole Community, almost the same range of fashion brands is available to consumers. There is very low preference for national brands, due to Community or world wide advertising campaigns and high brand awareness amongst fashion consumers. All this leads to luxury fashion products being sold on similar terms through out the whole Community.

6 General market overview

Having identified the relevant market, the Commission generally continues by describing the overall structure of the market. This is necessary since the market structure is determinative for the behaviour and performance of the market participants. Market structure affects performance through its effect on the companies' behaviour in terms of how they interact with each other.⁶⁰ In this respect the Commission usually places the emphasise on the main suppliers, the production process, the distribution channels and the marketing activities.⁶¹

6.1 The suppliers

A few multibrand groups dominate the luxury fashion market, each one directly or indirectly controlling several designers and fashion houses. Apart from those groups, the market holds a shrinking number of independent fashion houses and designers.

The leading luxury fashion group is Louis Vuitton Moët Hennessy (**LVMH**). LVMH has a wide portfolio of luxury fashion brands including Louis Vuitton, Givenchy, Christian Lacroix, Christian Dior, Thomas Pink, Guerlain, Emilio Pucci, Kenzo, Loewe, Celine, Marc Jacobs, Berluti, StefanoBi. Moreover, last year LVMH acquired control of Fendi and Donna Karan. LVMH also controls several of the fashion world's most desired top designers, like John Galliano, Jean-Paul Gaultier, Julien Macdonald, Narciso Rodrigues, Marc Jacobs and José Enrique Ona Selfa. Most of these designers have been acquired from small independent fashion houses.

The closets competitor of LVMH is **the Gucci Group**. The Gucci Group controls the fashion houses Gucci, Yves Saint Laurent, Sergio Rossi, Bottega Veneta, Balenciaga, and the designers Alexander McQueen, Stella McCartney and Nicolas Ghesquière.

Considerably smaller than the mentioned fashion groups, but with a similar multi-brand strategy, is the Italian fashion house **Prada**. Prada is a family-owned fashion house that has lately acquired several other fashion houses, such as Jil Sander, Helmut Lang, Church&Co and Azzedine Alaïa.

⁶⁰ Bishop, Matthew and Kay, John *European mergers & merger policy*.

⁶¹ See for example Case IV/M.794 Coca Cola chapter C.2, Case No IV/M.623 Kimberly-Clark/Scott chapter A and B, Case No IV/M.938 Guinness/Grand Metropolitan chapter C.1-3.

6.2 The activity

In order to secure complete control over costs, quality and image, the fashion groups and the larger fashion houses, like Prada, have integrated the production process and combined the production of several brands. Operations and expertise of one brand is used for other brands. For instance Sergio Rossi is also producing shoes for YSL and Gucci and the same designer is used for several brands, an example is Marc Jacobs who designs for Louis Vuitton, Céline and his own brand Marc Jacobs.⁶²

Luxury fashion products are distributed through networks of directly owned stores, franchised or licensed boutiques, authorised boutiques and through points of sales in department stores, i.e. a specified territory in the department store.⁶³ To ensure control over and consistency in distribution and customer service, the fashion groups are focusing on the directly owned stores for the exclusive sale of some of their brands.

The strength of commercial and marketing activities are important in the luxury fashion market. The leading fashion groups have advertising budgets representing around 10% of their sales.⁶⁴ The advertising budgets are mostly for long-standing campaigns and ads in fashion magazines complemented with high-profile messages. The objective of the latter is to benefit from significant media coverage, an example being both Prada's and Louis Vuitton's association with America's Cup (a race for sailing yachts).

⁶²Edmondson, Gail. *Saint Laruent's Newest Look*, Businessweek Online.

⁶³ Comparable to franchise-corner retailers (See Case IV/31.697 Charles Jourdan 89/94/EEC, (OJ 135 p.31) para7).

⁶⁴ Media Invest, *Consolidation in the Fashion and Luxury industry: A European outlook*, www.media-invest.com.

7 Market assessment

An assessment of both the product and the geographic dimensions of the luxury fashion industry result in the definition of a luxury fashion market. The market definition is however not the end, it is the beginning. It is the starting point of an analysis of the market situation in a specific industry, in this case the luxury fashion industry.⁶⁵

The purpose of a competitive analysis is to determine whether there is in fact workable competition in a market. The European competition law seeks to protect and promote effective competition and to ensure that the competition is not distorted in the market.⁶⁶ The competition in a market may be distorted in many ways. Still, it is more likely to be harmed where there is a degree of market power held by one or several companies. Companies with market power have greater strength to take recourse to anti-competitive means and to actually affect the structure in a market.

The notion of market power and dominance holds a concept of economic strength. This means that a dominant undertaking is in a position to behave independently of its competitors, customers and consumers and thereby hinder the maintenance of effective competition on the relevant market. The concept of economic strength thus includes two issues: the ability to behave independently and the ability to prevent competition. The latter may encompass the ability to exclude other firms, in other words a power to foreclose. It has been suggested that the most essential issue of these two is the ability to act independently on the market.⁶⁷

Both Article 82 and the Merger Regulation are concerned with market power, however from different perspectives. Article 82 is not concerned with dominance per se but with its abuse, while the Merger Regulation is concerned with the creation or strengthening of a dominant position, which may harm the competition in the market. Nevertheless, in order to assess the luxury fashion market in the light of Article 82 and the Merger Regulation, the focus must primarily be on what constitutes market power in this specific market.

⁶⁵ The Commission XXXIth Report on Competition Policy 2001.

⁶⁶ See chapter 3.

⁶⁷ Whish, Richard. *Competition Law*; Korah, Valentine. *An introductory guide to EC competition law and practice* and C-27/76United Brands.

7.1 Power in the luxury fashion market

When assessing the power of companies in a market, several factors have to be taken into account. Large market shares are important as evidence of market power, but it is not a constant factor. The importance of market shares varies from market to market according to the structure of the market. Consequently, each case has to be judged on its own merits and in the light of the characteristics of the particular market.⁶⁸

An assessment of market power in the luxury fashion market will therefore have to be based on an appraisal of all the specific features of this market, which might help to establish market positions. This will include market shares as well as characteristics of the luxury fashion industry that may serve as competitive advantages for the leading fashion groups.

7.1.1 MARKET SHARES

Market size and market share are normally calculated on the basis of the sales of the relevant product in the relevant area. In the luxury fashion industry, market shares calculated in value and not in volume better reflect the real market strength. Value shares clearer indicate the financial resources available to the fashion group or fashion house for reinvestments in the brands, for instance the advertising expenditure.⁶⁹

Earlier practise by the Commission seemed to suggest that dominance in general required market shares greater than 40 or 50%. There is however no formal threshold for market dominance and the Commission has been seen to depart from the 40% measurement. Companies with market shares exceeding 40% have not been considered dominant, whereas dominance has been found at market shares of 25%.⁷⁰ Yet, to conclude that there is dominance at relatively low market shares, additional factors indicative of market power are required.⁷¹

The market shares of the participants in the luxury fashion market cannot be calculated in this thesis. Instead, the net sales of the main fashion groups and fashion houses will be presented.

The net sales of the luxury fashion brands of **LVMH** were 3,200 million Euros.⁷² The **Gucci Group** accounted for net sales of \$2,300 million.⁷³

Since the competitive strength of companies is much dependent on the relationship between competitors in the market, those figures should be viewed in relation to the sales of other participants in the luxury fashion industry.⁷⁴

⁶⁸ C-76/85 Hoffman La Roch, para 39-40.

⁶⁹ See Case No IV/M.190 Nestlé /Perrier, para 40 and Case No IV/M.430 Procter&Gamble, para 116-7.

⁷⁰ For ex Case No COMP/M.1684 Carrefour/Promodes.

⁷¹ The Commission XXIXth Report on Competition policy 1999.

⁷² LVMH company overview 2000 (www.lvmh.com).

⁷³ The Gucci Group company overview 2000 (www.guccigroup.com).

⁷⁴ Case T-102/96 Gencor Ltd, para 202.

Prada's net sales were \$1,500 million.⁷⁵ The Spanish fashion group **PUIG**, owning the fashion houses Nina Ricci, Paco Rabane and Caroline Herrera, had net sales of \$750 million. The smaller Italian fashion house **Gianni Versace** had sales of \$425,5 million.⁷⁶

The actual impact on the conditions of competition may be greater than reflected by the market shares, or in this case net sales. In order to assess the market situation in the luxury fashion market, additional factors, such as buyer power, the strength of competitors and potential competition, have to be considered.⁷⁷

7.1.2 THE “MUST STOCK” FACTOR

Certain products can be considered as “must stock” products, i.e. an essential product that retailers have to carry to meet their customers requirements.⁷⁸ Such products have a strategic importance since they are difficult to replace with other products and retailers are dependent on them in offering consumers a credible choice of products. In short, the must stock factor is the need for retailers to stock a certain product.

In the case of the luxury fashion market, the must stock factor may apply to the leading brands. LVMH and the Gucci Group have created such strong image and brand loyalty for their brands, that they have become to a large extent standing elements in any luxury fashion boutique's brand mix.⁷⁹ The retailers must be able to offer those leading brands in order to meet the demand of consumers, which is generated by the constant advertising by and publicity of the luxury fashion groups' brands.

The must stock factor leads in general to low bargaining power of retailers and high negotiating power of the suppliers.⁸⁰ The fact that certain brands are “must stock” brands confers an advantage on the fashion groups controlling them in that there are no alternative suppliers of them. This places those fashion groups in a strong negotiating position in relation to the retailers. The buying power of retailers is significantly limited by the fact that they cannot afford not to offer those well-known brands. Without these brands, the retailer would risk not attracting the luxury fashion consumers since they expect the retailer to carry certain leading brands.⁸¹

⁷⁵ Guyon, Janet *Prada Steps Out*, BUSINESS 2.0.

⁷⁶ The Industry Standard, www.thestandard.com/companies.

⁷⁷ Cook, CJ. and Kerse, CS *EC Merger control*.

⁷⁸ Case IV/M.794 Coca Cola, para 137ff.

⁷⁹ Interview with Annika Elofsson (Paul&Friends).

⁸⁰ Case IV/M.794 Coca Cola, para 140.

⁸¹ C-27/76 United Brands, para 93.

7.1.3 PORTFOLIO OF BRANDS

The luxury fashion groups base part of their growth on acquiring and building rich brand portfolios. The combination of strong brands in the portfolio generates strength that may constitute a competitive advantage. Depending on the strength of the brands such a portfolio may lead to market power. It has even been argued that a portfolio of strong brands may in itself create or strengthen a dominant position.⁸²

A wide portfolio enables the fashion group to combine strong brand names, which may confer marketing advantages. For instance the fashion group will be able to bundle sales or to increase the sales volume of one brand by tying it to the sale of another⁸³. The fashion group can structure its discounts so as to encourage retailers to purchase the largest possible volume and to create disincentives for the retailers to change to other brands.⁸⁴

Furthermore, the combination of brands in the portfolio generates strength, which makes it possible to take advantage of economies of scale in advertising, production and distribution. Also, in a business of ever changing tastes and trends, controlling a number of fashion brands enables the group to spread the competitive risks.⁸⁵ Losses of sales in one brand can be, at least partially, compensated for by other brands.

7.1.4 ENTRY BARRIERS

In order to properly estimate market power it is crucial to make an assessment of the market's openness to entry by new competitors. Barriers to enter a market will be reflected in the extent to which a company may act in the market without facing competition from new entrants. Barriers to entry are assessed in order to see whether potential competition can be relied upon as a disciplinary device.

High entry barriers increase the power of a company active in the market to act independently of consumers and competitors, actual or potential. A truly competitive market on the other hand implies that companies are free to enter the market to compete with existing market players.⁸⁶

It has been suggested that decisive if a certain factor actually is an entry barrier is whether the necessary investments are sunk costs, i.e. an investment to enter or be active in a market that will be lost when leaving the market.⁸⁷ The ECJ and the Commission have adopted a wide view to entry barriers, in large including anything that might make it particularly difficult for a firm to enter a market.⁸⁸

⁸² Case No IV/M.938 Guinness/Grand Metropolitan.

⁸³ *ibid*, para 100.

⁸⁴ Case No IV/M.794 Coca Cola, para 147.

⁸⁵ Gallagher, Kirsten and Kasdon-Sidell, Louisa *The big business of fashion*, Clariant 2/2001.

⁸⁶ The Commission XXVth Report on Competition policy, 1995.

⁸⁷ Faull, Jonathan and Nikpay, Ali *The EC Law of Competition*.

⁸⁸ Whish, Richard. *Competition Law*.

Advertising and brand loyalty

The ECJ has in earlier cases recognised strong brand names due to large advertising campaigns as a competitive advantage that may be indicative of market power.⁸⁹ The existence of a relatively high level of brand loyalty in favour of certain brands can make it difficult to persuade users to change brand.⁹⁰ Brand loyalty may therefore act as an entry barrier as it makes customers less willing to switch to a new and unknown brand.⁹¹

The leading fashion groups have a competitive advantage over the newcomers. The fashion groups have through years of advertising created established reputations for their leading brands. They are continuing to invest considerable sums in publicity and promotion and thereby constantly increasing consumer fidelity for those brands. The entrants are on the other hand starting from scratch in building consumer awareness for a new unknown brand, and this requires high advertising expenditures.

The advertising costs are sunk costs, constituting a considerable disadvantage for newcomers compared with the established firms. The newcomers cannot recuperate those costs on high current sales volumes and in the event of market failure advertising expenditure is not recoverable. The high advertising costs add to the financial risk of market entry.⁹²

Consequently, the establishment of a new brand is costly and time consuming, since consumer acceptance may take several years. It is moreover an extreme risk because if consumers do not accept the brand, the investments are lost. Therefore, the need to invest in marketing can constitute a factor that may increase the market power of those leading fashion groups already established.⁹³

Access to distribution

Access to retailers with a new brand is difficult in many ways. First of all, retailers reflect the demand of consumers, which to a large extent is generated by publicity and advertising. This makes the advertising capacity of a new fashion house or designer an important factor in the willingness of retailers to stock a new brand. Entry to the market becomes a high-risk strategy since access to retailers will require marketing efforts by the fashion house or designer trying to establish a new brand.⁹⁴

Moreover, as the Commission has pointed out with regard to branded markets, it is often difficult to replace existing, well-established brands.⁹⁵ Some brands are necessary for the creation of an exclusive image to the boutique and department store. These brands are consequently in a stronger position than other brands. While retailers

⁸⁹ C-27/76 United Brands para 91-96, 122 and 129.

⁹⁰ Case IV/M.623 Kimberly-Clark/Scott, para 200 and Case No IV/M.430 Procter & Gamble, para 97.

⁹¹ Faull, Jonathan and Nikpay, Ali *The EC Law of Competition*.

⁹² Case IV/M.623 Kimberly-Clark/Scott, para 211.

⁹³ Korah, Valentine. *An introductory guide to EC Competition law and practice*.

⁹⁴ Interview with designer Marcel Marongiu.

⁹⁵ Case No. IV/M.190 Nestlé/Perrier.

depend on the fashion groups for such brands to attract consumers, the small fashion houses and designers have to convince the retailers to stock their brands.⁹⁶

Furthermore, the agreements between the fashion groups and the retailers may have the effect of rendering access to those retailers even more difficult for small or new designers and fashion houses. For instance, a fashion boutique wanting the handbags of a particular established brand is obligated to purchase a certain volume of the clothes-line complementing the handbags. Moreover, if the boutique wants one of the brands in a fashion group, it will have to buy some of the other brands as well.⁹⁷ Such obligations and criteria have the effect of binding the retailers to the full range of products of the fashion group and tying the retailers to complementing brands, leaving less room for brands and products of other fashion houses. The result is strengthened positions of the established fashion groups and raised barriers to entry for newcomers.

7.1.5 CONCLUSION

The discussion above points to the fact that there are factors in the luxury fashion market that may influence market positions and may be indicative of market power. Apparent is that market share is not the only factor when evaluating market power in this market.

Due to the importance of building brand values, the competition in the luxury fashion market is much about creating and maintaining an exclusive and prestigious brand image. In order to compete effectively, portfolio power, advertising capacity and access to the right distribution channels are all decisive factors. Therefore, strength and power in the luxury fashion market stem from the status of a must stock brand, the advantage of a portfolio as well as the resources and capacity for advertising activities and control over distribution.

⁹⁶ Interview with designer Marcel Marongiu.

⁹⁷ Interview with buyer Annika Elofsson, TIME *The Fashion Issue* Spring 2002 and Case No.IV/M.190 Nestlé/Perrier para 98.

7.2 Article 82 and the luxury fashion market

In the following part, the luxury fashion market will be appraised in the light of Article 82 of the EC Treaty. Article 82 is concerned with the abuse of a dominant position; the first question will therefore be whether there is in fact sufficient market power in the luxury fashion market to constitute dominance.

7.2.1 ESTABLISHING DOMINANCE

Considering the high and increasing net sales, the number of controlled stores, brands and designers, LVMH clearly has the strongest position in the luxury fashion market. The question is whether the market power of LVMH amounts to dominance. The position of LVMH in the luxury fashion market has to be evaluated by these factors that are indicative of strength in this specific market.

As a starting point in the appraisal of LVMH's market power, LVMH holds several competitive advantages, which make it different from its competitors:

The advantage of a portfolio of several must stock brands

LVMH has the largest portfolio in the fashion market. LVMH is capable of offering a whole range of the major, leading brands. The portfolio consists of not only one but several must stock brands. Not counting the designers, LVMH controls 15 luxury fashion brands. This should be compared to the Gucci Group, the closest competitor, which has a portfolio of five brands.

As discussed above, such a portfolio of major brands is a competitive advantage. It places LVMH in strong negotiating position vis-à-vis retailers, enabling exclusive deals to be imposed. The brand portfolio of LVMH also gives rise to possibilities of economies of scale, e.g. when buying large amounts of fabrics, when placing ads in fashion magazines etc.

Advertising campaigns as indicative of market power

In the Kimberly Clark case the Commission argued that it was shown that there is a correlation between on the one hand consumer brand loyalty and advertising expenditure, and on the other hand between advertising expenditure and market share.⁹⁸ If applied to the luxury fashion market, this strengthens the view that LVMH has an extremely strong market position.

LVMH spends approximately 12% of the yearly turnover on marketing and advertising expenditure. LVMH is able to combine the advertising budgets for its brands and the brands also prosper from several years of heavy advertising. The advertising campaigns by LVMH have generated strong brand awareness and preference, which in fact gives LVMH to some extent protection from competition

⁹⁸ Case IV/M.623 Kimberly-Clark/Scott, para 139-145.

from other brands.⁹⁹ This is reflected in that, for a boutique to be considered as a luxury fashion boutique, brands of LVMH are required parts of the brand mix of that boutique. In contrast, the small fashion houses and designers do not in general have specific advertising budgets at all.¹⁰⁰

Considering LVMH's advertising capacity, the ability to create consumer demand, together with the fact that almost each brand in LVMH's portfolio actually is a "must stock" brand with strong image, LVMH clearly has an advantage compared to other fashion groups and fashion houses when dealing with retailers, media, models etc.

The advantage of high vertical integration

The vertical integration with regard to production and distribution may be a competitive advantage indicative of dominance.¹⁰¹ The extent to which LVMH's activities are integrated provides it with a certain commercial stability. LVMH has a stringent control over the production processes of its brands, with integrated factories and combined production of several brands. Such efficiencies which may be the result of combined production of various brands may constitute an advantage possible of creating or strengthening dominance.¹⁰² Moreover, LVMH has a well-developed distribution network with controlled boutiques, department stores and duty free shops, which confer a commercial advantage over the competitors.¹⁰³

Restraints by retailers

The fact that LVMH controls a portfolio of essential brands makes retailers to a large extent dependent on LVMH in order to attract consumers. The must stock factor is extremely important in this respect.¹⁰⁴ Retailers are dependent on LVMH for more than only one must stock brand and this gives LVMH strong negotiating power vis-à-vis retailers. Retailers are therefore not able to exert a significant restraining effect on the market behaviour of LVMH.¹⁰⁵

Moreover, retailers' ability to counterbalance the power of LVMH is reduced because of the actually increasing portfolio of LVMH.¹⁰⁶ Bargaining power is much more effective in restraining market power when the retailer has several sources of supply. In this case, LVMH is in fact continuing to acquire brands¹⁰⁷, which leads to a reduced choice of suppliers for retailers, and further reliance on LVMH for the major brands. A consequence also being insufficient inter-brand competition, where retailers are not able to take advantage of competition between different brands.

⁹⁹ Kotler, Philip *Marketing management*.

¹⁰⁰ Interview with designer Marcel Marongiu.

¹⁰¹ Case 27/76 United Brands, Case 53/92P Hilti AG, para 69.

¹⁰² For ex Case No IV/M.050 AT&T / NCR where cost savings were regarded as a factor which could lead to the creation or strengthening of a dominant market position.

¹⁰³ C- 85/76 Hoffman La Roche v Commission, para 48 and C-322/81 Michelin v Commission, para 58.

¹⁰⁴ Case IV/M.794 Coca Cola, para 182.

¹⁰⁵ Case IV/M.623 Kimberly-Clark/Scott, para 185ff.

¹⁰⁶ Case No.IV/M.190 Nestlé/Perrier, para 80.

¹⁰⁷ Donna Karan and Fendi are the latest acquisitions of LVMH, see LVMH Company Overview 2001.

Restraints by actual competitors

It is obvious that the competitors of LVMH all have weaker portfolios of brands. The absence of a broad portfolio is a competitive disadvantage when dealing with other market players. Not to overlook, competing fashion groups and houses do supply important brands that perform well. Contrary to the combined portfolio of LVMH, those competitors however lack the support of a strong portfolio of several brands. This reduces the power of those competing brands since they are spread out among several fashion groups and fashion houses.

Competing fashion groups and fashion houses do not have the same financial resources as LVMH. For instance, those fashion houses with few, isolated brands cannot afford the significant investments needed to achieve strong market positions for their brands. LVMH, on the other hand, has considerable financial resources to support internal growth by making investments in advertising, promotion and distribution for each brand. Moreover, LVMH has the capacity to counter eventual competitive pressure from competing brands through repositioning of its brands and expanding their sales.

In addition, the smaller fashion houses do not always have the accurate distribution networks needed to sell their designs. The luxury distribution network of LVMH is clearly the most developed, including the exclusive department stores Le Bon Marché and La Samaritaine, the DFS group (duty-free travel stores), the e-commerce site eLuxury.com and 765 directly controlled fashion stores.¹⁰⁸ As a comparison, the Gucci Group has 288 directly controlled stores.

The small fashion houses and designers do not have an advertising budget. The only budget they have is for the press shows, also called the Fashion Weeks, twice a year. This is a disadvantage since the small fashion houses and designers cannot in their trade promotion, when persuading a retailer to carry their brand, offer and promise advertising campaigns. They can neither offer department stores to participate financially in store-corners.¹⁰⁹

It should also be mentioned that 90% of the fashion magazines' coverage is for the frequent advertisers, in other words the big fashion groups like LVMH and the Gucci Group.¹¹⁰ The remaining 10% is what all the small fashion houses and designer fight for. In principal this means that the brands of LVMH get more media coverage than its competitors. First, through its own advertising campaigns and, secondly, through the attention and free promotion LVMH brands get in fashion reports.

The cumulative effect of those circumstances may be summarized as leading to a weak competitive situation of the competitors of LVMH.

¹⁰⁸ www.lvmh.com/finance/12k0004a.htm (09.04.2002).

¹⁰⁹ Interview with designer Marcel Marongiu.

¹¹⁰ Ibid.

Restraints by potential competitors

Furthermore, the question is whether there is any potential entry capable of constraining the market power of LVMH. For potential competition to have any impact, there must be potential competitors that are likely to enter the luxury fashion market, and which may do so within a short time period.

It is increasingly difficult for new designers to enter and survive in the luxury fashion market. This is much the situation because of existing consumer brand loyalty and the need for substantial advertising expenditures. There are difficulties in getting access to the right fashion boutiques and the absence of a “must stock” brand or a broad portfolio of brands further limits a newcoming fashion house’s or designer’s negotiating position vis-à-vis the retailers.

The barriers to entry are not necessarily insuperable when considered individually. However, when taken together they do constitute a very strong disincentive for any potential entrants to the luxury fashion market. A successful market entry is difficult because of the cumulative effect of those entry barriers. The reality of the barriers can be seen in the fact that the majority of designers entering the luxury fashion market actually survive either by joining a fashion group and exclusively design one of its brands, or by agreeing to design one of the fashion group’s brands while the group funds the designer’s own line.¹¹¹

7.2.2 CONCLUSION

It is apparent how LVMH holds competitive advantages over the competing fashion groups and fashion houses. LVMH is in a position to strongly influence the competitive conditions in the luxury fashion market. The retailers and the competitors, actual and potential, have little strength to constrain the ability of LVMH to act independently in the market.¹¹² This position of market power may be found to be dominant without any of the competitive advantages being decisive. Instead of considering each factor separately, a dominant position of LVMH may derive from all those advantages and market specific factors taken together.¹¹³

In sum, the discussion above shows that LVMH is in such a strong and unaffected position that the existence of dominance cannot be ruled out. A final decision on whether there actually is a situation of dominance is not possible in this thesis. The assessment has to stop at the conclusion that there are in fact several factors present in the luxury fashion market that are indicative of market power, perhaps even dominance.

¹¹¹ TIME *The Fashion Issue*, Spring 2002.

¹¹² Case IV/M.794 Coca Cola , para 193-5.

¹¹³ T-228/97 Irish Sugar v Commission.

7.2.3 APPRAISING ABUSIVE BEHAVIOUR

As have been pointed out, it is however not the dominant position per se that may be prohibited, it is the behaviour by the dominant whereby this position is abused. It is the means by which a dominant company distorts the competitive situation in the market that falls within the ambit of Article 82.

The following part is in the form of scenarios of behaviour that may be abusive of an eventual dominant position of LVMH in the luxury fashion market. The purpose is to describe some ways in which the competitive conditions in the luxury fashion market may be distorted.

Abusive behaviour

The essence of Article 82 is the control of dominance, yet directed at the behaviour of the firm in the dominant position.¹¹⁴ The notion of abuse of power is purely objective and it does not include any accusation of immoral, indecent or criminal behaviour. The focus is on the impact a practise has on a market structure with the intention to maintain an effective competition. Behaviour that proves to be defective in view of the general objectives of competition policy will be considered abusive.

A dominant undertaking, irrespective of the reasons for which it holds such a position, has a special responsibility to not allow its conduct to impair genuine competition.¹¹⁵ This responsibility can be justified by the fact that larger firms have greater power to cause damage than smaller firms have. A dominant undertaking may have recourse to business practise that a “normal” undertaking is either unable to engage in at all because of lack of economic power or cannot afford to engage in because of a risk of commercial loss.

The Court has adopted a wide definition of abuse and related the definition to the aims and objectives of Article 82. Prohibited is in particular the exploitation of suppliers, customers, markets or consumers designed to secure the awards of holding dominance. Such exploitation of market power may be especially harmful to consumers. Also covered by the prohibition in Article 82 is anti-competitive behaviour designed to prevent competition. Such behaviour may be harmful to competitors, actual or potential.

¹¹⁴ See chapter 3.

¹¹⁵ C-322/81 *Michelin v Commission*.

Behaviour by LVMH

LVMH has a position in the luxury fashion market that gives it the power to act to a certain extent independently of other market participants as well as consumers. It is in a position to influence the competitive structure of the market and to some degree act in disregard of it.

In which ways may then the competitive structure in the luxury fashion market be distorted by reason of the, potential, dominance of LVMH? Given the degree of brand loyalty and the need for retailers to stock certain brands, LVMH controlling the main part of those brands is in a strong position to dictate the competitive conditions in the luxury fashion market through distribution arrangements. The focus will therefore be on such arrangements since they may be found to be abusive of a dominant position.

Anti-competitive behaviour vis-à-vis retailers

LVMH is in a position to pursue a tied branded policy through agreements whereby the sale of one brand is linked to the sale of another. If the boutique wants one of LVMH's brands, it has to buy others as well.¹¹⁶ Such practise may be found to be exploitation of market power in the supply of one brand in order to strengthen sales of other brands. The effect of the conduct is to prevent free choice, i.e. the commercial freedom of retailers, and to exclude competition.

Also, due to the weak countervailing power of retailers, LVMH is in a position to bind the retailers to the full range of products of its brands. For instance the boutiques are obligated to buy a certain volume of a clothes-line of a particular brand in order to get the best-selling accessories. Such practise strengthens the position of LVMH and may further restrict the commercial freedom of retailers. The retailers have less space left in the boutique for other products and less financial capacity to buy other brands.

Anti-competitive behaviour vis-à-vis competitors

New competitors can be prevented from entering the market by vertical arrangements between LVMH and retailers. This is in particular the case where a large number of retailers on the market are tied by an obligation on the part of LVMH.

Linking the sale of one brand to the sale of others may have the effect not only of preventing retailers from free commercial choices but also of excluding competition. Access to the luxury fashion market may be rendered appreciably more difficult for competing fashion houses and designers. The same effect may be achieved by the tied policy whereby retailers are obligated to buy certain volumes of products of a collection before qualifying for accessories like shoes and bags. Less space and financial efforts are left for retailers to buy products from other fashion houses and designers, leaving them with shrinking possibilities of getting access to retailers.

¹¹⁶ TIME *Fashion Issue* Spring 2002.

The result of such practices may be a foreclosure effect in terms of raised barriers to entry for newcomers as well as an attempt to exclude existing fashion houses and designers from further access to the market. This may be in conflict with the objectives pursued under Article 82. In accordance with the objectives of competition policy and Article 82, the small fashion houses and designers should at least have an opportunity to try to enter the luxury fashion market without being devoured by LVMH.

Tied sales and linking brands may constitute anti-competitive behaviour if undertaken by a dominant fashion group. Obligations to obtain supplies exclusively, either in the form of linked brands or tied products, from LVMH may be incompatible with the objective of undistorted competition within the common market. Such obligations may be designed to deprive the retailers of or restrict the possible choice of sources of supply and to deny fashion houses and designers access to the market.

7.3 Merger concerns in the luxury fashion market

In the previous chapter, dominance and abuse according to Article 82 have been discussed. The possibility of dominance in the luxury fashion market has been observed, followed by a description of possible abusive behaviour.

The following chapter deals in short with the situation on the luxury fashion market from the point of view of merger review. A few ways are described in which the competitive structure in the luxury fashion market may have been affected and harmed by past years acquisitions. Also, with the latest acquisition by LVMH of the sole control of Fendi¹¹⁷ as an example, the impact on the luxury fashion market of future similar operations by LVMH is discussed.

7.3.1 MERGER REVIEW

Merger control forms part of the strategy for promoting economic efficiency in the Common market.¹¹⁸ The Merger Regulation applies to significant structural changes of the competitive impact in the Common market. The aim is to promote and preserve an effective competitive structure to the benefit of customers and consumers.¹¹⁹

The process of reorganisation, i.e. structural changes within the Common market through acquisitions and mergers, must not cause lasting damage to competition. Therefore, it is from the point of view of the need to maintain and develop effective competition that mergers and acquisitions must be appraised.¹²⁰

The effect of the past acquisitions on the market

So far none of the acquisitions in the past years in the luxury fashion industry has been considered to have substantial impact on the market structure according to the Commission. Nevertheless, there is no doubt that the acquisitions have together altered the structure of the luxury fashion industry. The main control of the fashion industry has, by way of those acquisitions of designers and fashion houses, been more or less divided between few luxury fashion groups, and among those LVMH has clearly obtained a prominent role.

The acquisitions in the luxury fashion market have reduced the choice of the retailers between several currently independent fashion houses and designers. Instead of a multiplicity of fashion houses and designers, the retailers now have to turn to a small number of fashion groups or houses. This has inevitably increased the dependency of retailers on the big fashion groups for supplies. Moreover, the tying of the acquired brands operated by each fashion group covers a wide range of reputable brands. Therefore, not only have the retailers' choices been reduced but the tying of different

¹¹⁷ www.visualstore.com/rn/nod/nod20011127816.html (2002-04-09).

¹¹⁸ See chapter 3.2, 3.2.2.

¹¹⁹ The Commission XXth Report on Competition Policy, 1990.

¹²⁰ Recital 4, 13 of the Merger Regulation.

brands in the luxury fashion market has further increased their dependency on the big fashion groups.

Consequently, due to the acquisitions, the luxury fashion market has become a much more concentrated market.

The effect of future acquisitions on the market

Previously, it has been shown that it is possible to define a relevant market of luxury fashion products as well as to take into account several industry specific factors when analysing market power in this market. It has further been emphasised what a powerful and influential situation LVMH holds in the luxury fashion market. Taking this into consideration, how will future acquisitions and mergers in the luxury fashion industry affect the market structure?

When appraising an acquisition by LVMH in the luxury fashion market, such as the one of Fendi, the market power of LVMH is decisive. An acquisition may give rise to fears about increased market power on two grounds: by increasing market shares and by reducing the number of effective competitors in a market. The market shares of the market players will not be calculated in this dissertation. It can however be concluded that LVMH has a strong market position which as a consequence of each acquisition will be further strengthened, not the least by the reduced number of independent, competing fashion houses and designers left in the market.

Even though the direct effect of, for example, the acquisition by LVMH of Fendi may not be a substantial change in the market structure, it may cause equal important indirect effects. Given the situation of already reduced number of competitors and suppliers, small but still independent fashion houses may provide a source of potential competition to LVMH. In such circumstances, a take over by LVMH of Fendi may reduce the future competitiveness of the fashion industry by eliminating the possibility that the acquired fashion house Fendi will in the future be in a position to challenge LVMH.¹²¹

7.3.2 A REDUCTION IN COMPETITION

When appraising an acquisition or a merger under the Merger Regulation decisive is whether a dominant position is created or strengthened¹²². Such a point of view has its limitations. An acquisition may not create or strengthen market power to the point of dominance, however it may have a restrictive effect on the competitive situation in a market. Yet, unless the competitive structure will be harmed by dominance, the operation in question will not be considered to cause appreciable competition concerns according to the Merger Regulation.

¹²¹ Commission Staff Working Paper, 2002 European Competitiveness Report.

¹²² Article 2(3) of the Merger Regulation.

The SLC test

The way in which dominance is decisive in merger reviews has been questioned. For instance, one view expressed is the suggestion of using the so-called substantial lessening in competition (SLC) test in merger review instead.¹²³ Under a SLC test, mergers and acquisitions that do not necessarily result in dominance but nonetheless will increase the unilateral market power by the parties may be caught. Greater emphasis is placed on firm behaviour and market competitive dynamics than on corporate size or industry concentration. The focus of the SLC test is on the intensity of potential competition and the sources of profitability, instead of on market shares and concentration as indices of market power.

Tendency in case law

In the case regarding the merger of AstraZeneca and Novartis¹²⁴ the Commission did focus on the projected future developments of the companies' product portfolios. This may be seen as placing emphasis on future market behaviour and the probable risk of a general reduction in competition. When considering the future developments of product portfolios, an assessment of the likely intensity of potential competition post-merger is with necessity included. Moreover, the Commission did also point at the importance to consider the risk of whether an operation will cause changes in the economic incentives of the parties that may lead to a substantial change in the functioning of the market.¹²⁵

In the Guinness/Grand Metropolitan case¹²⁶, concerns were that the merger would reinforce the bargaining position of the parties. Such concerns are indeed about the future behaviour of the companies and on market competitive functions.

It may thus be possible to notice some tendency towards a more flexible use of the dominance criteria in the merger review by the Commission, resembling a more SLC-like approach.

Consequences for the luxury fashion market

In general, the acquisitions in the luxury fashion industry concern small and often family-run fashion houses and independent designers. Due to the size of the acquired fashion house or designer, no operation within the luxury fashion industry has been considered to create or strengthen dominance. As a consequence, the competitive effects of the acquisitions in the market have never been appraised.

For instance, the latest takeover by LVMH of the fashion house Fendi with little market share resulted in small actual changes in market positions. Still, the operation

¹²³ See for example the LECG Submission to the Commission of the European Communities on Green Paper on the Review of Council Regulation (EEC) No.4064/89.

¹²⁴ Case No. COMP/M.1806 – Astra Zeneca/Novartis.

¹²⁵ The Commission XXXth Report on Competition Policy, 2000.

¹²⁶ Case IV/M.938 Guinness / Grand Metropolitan.

may nonetheless increase the unilateral market power by LVMH, giving LVMH the incentive and ability to exercise strength in the luxury fashion market. Despite the actual market size of Fendi, the result of the acquisition may in fact be foreclosure of competitors and restrictions in the commercial freedom of distributors. This may cause a distorted competitive situation in the luxury fashion market. Thus, even if no dominant position will be created or strengthened, the operation may nevertheless affect the workable competition in the market.

An appraisal of an operation under the Merger Regulation focuses on the probable structure of the market and dominance after the operation in question. If instead directing the appraisal towards the economic behaviour, such as the incentives for the companies to engage in various business strategies post-operation, it would possibly make the merger review more focused on whether competition will in fact be distorted. The assessment would then be more concerned with the effects likely to result from the acquisition, i.e. potential reduction in competition. It is possible that this would lead to a more complete description of the competitive harm the operation may cause and therefore to anti-competitive behaviour being better captured. This would not only make the actual competitive situation and potential competition concerns in the luxury fashion market visible, but it would be in line with the competition policy.¹²⁷

¹²⁷ See chapter 3.1.

8 Conclusive remarks

In the application of the European competition policy and rules, it is clear that each market and case give rise to specific and individual competition concerns. This thesis has dealt with Article 82 and the Merger Regulation under the EC competition rules. Those instruments have been assessed in relation to an example industry, the luxury fashion industry. The application of Article 82 and the Merger Regulation to this industry has brought to light how important and decisive it is for the assessment under those rules to properly identify the boundaries and the characteristics of the relevant market.

First of all, it is shown how the use of the general principles of defining a relevant market in competition cases may result in a more narrowly defined market of luxury fashion products than would be the first impression. Applying those principles to luxury fashion products leads to a distinct and separate market for the products in relation to other luxury goods as well as ordinary, non-luxury fashion products.

The importance of defining a relevant market becomes clear when the competition rules are to be applied to the market in question. A properly defined market is fundamental when appraising which factors are significant in the competition analysis. It is first when a relevant market has been defined that the competitive situation with regard to the characteristics of the market in question may be assessed.

Regarding the luxury fashion market, principles and methods used by the Commission in previous cases concerning branded markets are of relevance. The competitive situation in the luxury fashion market should be appraised with regard to those factors which the Commission has found relevant to other branded markets as well as the characteristics of the luxury fashion industry. It is however not possible in this thesis to take a final decision on the degree of dominance and workable competition in the luxury fashion market. Apparent is though how the fashion market has gone through radical changes in structure and how the market situation is to a certain extent dependent on or dictated by a few powerful companies. My view is that there is in fact a degree of market power in the luxury fashion market, which may indicate the need to more thoroughly examine the situation and conditions of this market.

The reason why no acquisition in the luxury fashion industry has been fully assessed is because, without having defined a relevant market, the size of the acquired fashion houses and designers has by the Commission been assumed insignificant. Nevertheless, my believe is that, despite the size of the fashion houses and designers, the acquisitions may have affected, or that at least future acquisitions may affect, the structure and the competitive conditions of the luxury fashion market. If too much emphasize is placed on dominance, there may be a risk that the actual situation and concerns in the market will not be visible. In order to shed light on this problem, an alternative way of viewing mergers and acquisitions is presented, i.e. regarding an operation from its possibilities of substantially lessening the competition in a market. This may be seen as a more forward-looking way of analysing operations.

It is possible that an assessment of the acquisitions in the luxury fashion market from a broader point of view than merely out of a dominance perspective, would more accurately describe the actual and potential market situation. Such an assessment may allow for a clearer identification of actual problems and concerns in the market and therefore capture a more diversified range of competitive problems. In fact, the result may be a competition analysis that to a further extent complies with the objectives of the competition policy in protecting fair and effective competition.

My point is not that the Commission erred in not fully assessing the notified concentrations. Yet, in some circumstances the competition analysis, in this case under Article 82 and the Merger Regulation, may not always describe the entire competitive situation in a market. When appraising market power and dominance in a market it is vital to investigate into what actually constitute competitive advantages for the market players. Especially in a market such as the luxury fashion market, a market in change both by structural means and by altered business strategies like the greater focus on branding, advertising and marketing; decisive must be to examine which factors in practise generate power to behave to the detriment of customers and competitors.

In the end, the assessment of Article 82 and the Merger Regulation shows that initially a competition analysis of market power is dependent on how the relevant market is defined. In order to properly outline the characteristics and thereafter the situation in a market, a precise definition of the market is vital. A workable competition in a market is dependent on the interaction of several, different and market specific factors, each of relevance to how that market functions. My believe is that those characteristics and factors should have a more decisive role when analysing a market and that this may lead to a more accurate result than when focusing on dominance. In relation to the luxury fashion industry, the consequences of identifying a relevant market may be that this industry is to be considered of interest for competition authorities to assess whether the market situation in fact meets the objectives of the EC competition policy.

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