LVMH SUBMISSION
DIRECTORATE GENERAL
INTERNAL MARKET & SERVICES:
EC Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC)
EXECUTIVE SUMMARY 04

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The key for growth: ensuring consumer and business trust online

The LVMH Group welcomes the opportunity to respond to the European Commission’s public consultation on the “future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce.” The Commission rightfully recognises the importance of e-commerce for innovation and growth in Europe, a view we share wholeheartedly.

LVMH has been a pioneer in recognising the power of the internet to give consumers everywhere access to its Brands and to connect with clients and fans throughout the world.

LVMH has more brands actively engaged with the internet than any other luxury group globally, with the goal of bringing the luxury experience to consumers no matter where they are. Nearly all Brands of the Group are sold online through either their own websites or approved third-party websites that deliver a luxury experience. In addition to e-commerce, LVMH actively supports its Brands in creating robust interactive marketing and advertising strategies.

The LVMH Group’s main activities include the design, production, marketing and distribution of luxury goods. LVMH offers high-quality products and services that meet the consumer’s demand for excellence. This business model is based on continued innovation and creativity and is sustained by ongoing investment in highly skilled manufacturing in Europe, where the vast majority of our products are made. We export the majority of our products and approximately 70% of our revenues derive from outside of the EU. 1

The luxury industry is a vital part of the European economy and European Commission Vice-President Antonio Tajani, in charge for Industry and Entrepreneurship, recently underlined “[t]he European Luxury goods sector is a key component of sustainable growth in Europe and on-going Creativity and Innovation. Luxury exports have continued to grow through the financial crisis and the sector is an example of European Cultural Excellence at its best”. 2

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1 LVMH’s business model applies to all of the Brands of the Group, which include Louis Vuitton, Céline, Kenzo, Givenchy, Christian Dior, Guerlain and Chaumet in France; Fendi, Pucci, Stefanobili and Acqua di Parma in Italy; Benefit Cosmetics, Donna Karan and Marc Jacobs in the United States; Loewe in Spain; Thomas Pink in the United Kingdom; TAG Heuer, Zenith and Hublot in Switzerland. Moreover, the Group counts other prestigious brands in wines and spirits, among them Dom Pérignon, Ruinart, Veuve-Clicquot, Krug, Yquem, Cheval-Blanc (in France), Numanthia (in Spain), Glenmorangie and Ardbeg (in the UK), and Belvedere (in Poland). The LVMH Group is also active in selective retailing and owns Sephora and Le Bon Marché.

2 Statement at Altagamma Monitor conference held in Milan on 18 October 2010
We believe the biggest obstacle to the development of e-commerce today is that consumers and businesses do not have legal certainty, when operating online, which results in a lack of consumer trust in the digital environment. Only if legal certainty and consumer trust can be increased, will e-commerce, and particularly cross-border e-commerce, thrive in Europe.

The European Commission, and indeed the European Parliament are aware of these difficulties and have already voiced a need for clarification of the liability regime of online service providers in Europe. The European Commission has stated in its Digital Agenda that “it may be necessary to update provisions such as limited liability of information society services in line with technological progress”. 3 Similarly, the EU 2020 strategy calls on EU and national legislation to be adapted to the digital era, including updating rules on liability. 4

The European Parliament also supports this approach in its recently adopted Report on the Development of E-Commerce in which it calls for the European Commission to update “the rules on the limited liability of information society services so as to keep up with technological progress, in the context of the e-commerce directive”. 5

In order to achieve greater consumer trust online LVMH considers that, like in the offline environment, opportunities and responsibilities must be shared among operators along the digital value chain, in consideration of the economic and business realities of each operator’s business model. 6

In addition, we believe a number of structural and regulatory barriers hinder e-commerce from thriving in Europe. Our Brands have experienced these barriers - particularly around cross-border e-commerce - which include issues with payment systems and postal services, as well as the lack of harmonised VAT and excise taxes and registration procedures. These obstacles result in a fragmented e-commerce internal market and we suggest in our response below the priority barriers the European Commission should focus on.

How to achieve consumer trust and certainty when operating online?

The original intent of the E-Commerce Directive (“ECD”) was to grant a liability exemption regime to online service providers providing “basic” services of storage and transmission of data with the aim of promoting a rapid and efficient development of the internet.

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3 EC Digital Agenda COM (2010) 245 final/2, 28 August 2010, p. 12, footnote 13,
4 EU 2020 COM (2010), p. 10
5 Report on completing the internal market for e-commerce (2010/2012(INI)), Article 59
6 Online 'service provider' is to be understood as defined in the E-Commerce Directive: “any natural or legal person providing an information society service.” ECD, L 178/9.
However, significant technological developments have led to the emergence over the last ten years of new online activities, new services and new online providers. These additional services are generally commercial activities, supported by advertising, which go beyond the mere storage or transmission of data and are not any more passive, automatic and technical in nature.

But in many instances, online service providers carrying out commercial activities that go beyond basic storage of data claim that they must be considered as “hosting” providers within the meaning of the ECD because they also offer “basic” internet services. Based on this, these online service providers further claim they should benefit from the liability exemption regime of the ECD.

The result is that currently consumers and businesses do not have a proper right of redress something goes wrong with their online experience, leading to low levels of trust and security online. This consumer and business confusion and lack of clarity has resulted in a proliferation of court cases with different outcomes across Europe with regards to the interpretation of the liability exemption in the ECD.

LVMH strongly believes the Commission should bring an end to this uncertainty through clarification of the ECD provisions with the aim of maintaining a balance between (i) the value of free communication and commerce via electronic means in the EU; (ii) the protection of consumers, including in e-commerce; and (iii) the balance between the legitimate interests of right owners and online service providers.

Against that background, we believe there is an opportunity for the European Commission to foster trust and security online by returning to the original intent of the ECD. The European Commission should clarify - without reopening the ECD - where to draw the line between those online service providers whose activities are limited to the storage and transmission of data and those online service providers that go beyond the storage and transmission of data within the meaning of the ECD.
LVMH proposes that in the event online service providers do not limit their activities to mere storage and transmission of data at the direction of a user but go beyond that, by actively using, presenting, organizing or modifying users’ materials for commercial purposes, they do not qualify as hosting providers within the meaning of the ECD.

Such online service providers fall outside the liability exemption regime and are under a duty to reasonably act as careful and diligent business operators to detect and prevent online illicit practices, in addition to promptly remove or disable access to illicit acts or content upon obtaining knowledge or awareness of such illicit acts or content.

In practice this means that the European Commission’s much needed clarification would enable:

- **Detection and prevention of online illicit practices.** Online service providers that cannot benefit from the liability exemption regime should take any measures, technical or procedural, automated or non automated, aimed at the timely prevention and adequate response to attempts to perform or repeat illicit acts online as soon as technically and reasonably feasible; and

- **Removal of illicit acts or content upon knowledge or awareness.** The Commission should consider recommending harmonized Notice and Take Down (NTD) procedures at the EU level, which would undoubtedly help to further legal certainty and, ultimately, consumer trust.

The Commission should also implement clear guidance as to how information can be shared between legitimate stakeholders in the spirit of cooperation in order to efficiently fight against online illicit practices.

**European consumers and businesses need a balanced and pragmatic approach**

We believe this approach is respectful of the online service providers’ rights. The fact that online service providers do not qualify as hosting providers within the meaning of the ECD does not mean that they are liable *ipso facto* for any online illicit act or material. It only means that they are under a duty to act as careful and diligent business operators. The specific conditions under which their liability might arise must be sought in the context of the relevant national law on tort liability, unfair competition or honest practices in industrial and commercial matters.
LVMH believes the proposed clarification of which online service providers qualify or not as hosting providers within the meaning of the ECD would help to safeguard consumers online and should be endorsed by the European Commission for the following reasons:

- This approach requires no rewriting of the Directive;
- This approach is legally supported by the strict interpretation principle of exceptions;
- This approach is consistent with the economic and business realities of these online service providers’ business models;
- This approach is a balanced and careful response that does not go as far as in other sectors in terms of responsibility along the value chain;
- This approach is a careful and thoughtful response that will reinforce the credibility of the online service providers’ activities;
- This approach would not prevent cooperation between all stakeholders.

LVMH believes that this approach will clarify the responsibilities along the digital value chain and will therefore increase legal certainty and consumer trust.

LVMH further believes that the question of e-commerce is not only addressed by the ECD. There are a number of other policy instruments that, directly or indirectly, have an impact on the ECD and therefore on e-commerce, such as the Unfair Commercial Practices Directive («UCPD») or the Intellectual Property Rights Enforcement Directive («IPRED»). LVMH suggest that the European Commission should adopt a comprehensive approach and use these policy instruments to positively influence e-commerce in Europe.

LVMH also believes that the European institutions should work closely with their counterparts on a global basis, in particular with the US and China, to find efficient tools to fight against illicit online practices and to boost e-commerce. The global reach of the internet means the European legal framework needs to take into account the challenges outside European borders. This is also true with respect to the protection of trademarks online.

Finally, LVMH is convinced that there is room for cooperation among all stakeholders to ensure that legal certainty and consumer trust can be increased in order for e-commerce to thrive in Europe. LVMH remains open to dialogue in the spirit of cooperation to find innovative tools and pragmatic solutions to efficiently fight against online illicit practices and increase consumer confidence. LVMH would be delighted to have an opportunity to further discuss its proposals with the European Commission.
I. LVMH AS A DIGITAL STAKEHOLDER

Each of our brands is strongly encouraged to invest in robust and innovative digital strategies that allow them to bring their individual heritage and style to a broader range of customers than ever before. This is manifested in their own sites, in their partnerships with other web leaders, and in the way they interact directly with customers online, including through social media.

In these efforts, the aim of our brands is to offer a distinct digital experience that is differentiated from other e-commerce sites across the web. This means designing and investing in best-in-class, personalised and integrated services that reflect the uniquely creative nature of the Brands. Our Brands leverage the latest technological advances to bring alive online the quality that is associated with luxury.

A. A SUSTAINABLE BUSINESS MODEL

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Throughout the economic crisis LVMH continued to grow and to invest in its employees, in innovation, in research & development and in its retail network, online and offline. This strong structural base enabled our Brands to withstand the crisis, and in the first nine months of 2010 the Group experienced organic revenue growth of 14% compared to the same period in 2009.

The luxury goods industry as a whole is of major importance to the European economy. It employs

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approximately 800,000 people (directly and indirectly) in Europe with an annual turnover of approximately 170 billion Euros. European citizens understand this, and in a recent survey 69% of respondents said that the luxury goods industry plays a vital role for the creation of employment and the competitiveness of Europe in relation to the rest of the world.

This was confirmed by European Commission Vice-President Antonio Tajani, in charge for Industry and Entrepreneurship, who recently stated: “the European Luxury goods sector is a key component of sustainable growth in Europe and on-going Creativity and Innovation. Luxury exports have continued to grow through the financial crisis and the sector is an example of European Cultural Excellence at its best”.

As a result, LVMH believes that luxury brands are in a position to make best use of the possibilities offered in the digital space as it is an area where creativity and customisation reach higher levels through the constant development of sophisticated tools. As new digital tools are developed, which re-shape inter-people relationships and offer new perspectives to creative minds, online creativity permeates the sphere of visual and performance arts. Similarly, our creative teams are naturally induced to leverage the wealth of opportunities on offer: they embrace the internet as a full-status component of their brand’s expression territories and are excited by the challenging opportunities on offer. In addition due to the user-centric nature of the internet, digital tools allow for more granularity in terms of Customer Relationship Management (CRM) and can lead to fully customised relations with clients. With digital, luxury brands thus enjoy a new channel to generate intimacy with their customers.

It is thus the combination of continuous innovation, highly skilled employment, investments in art, culture and creativity and export abroad that underpins the solid performance of LVMH. Our business model thus strives to reflect the smart, sustainable and inclusive growth that the EU’s Agenda 2020 is advocating and as such LVMH represents a sustainable business model for Europe. Through our products, our services and our communications offered in the digital environment, we are already a major digital stakeholder and digital content provider.

9 See “European perceptions of the luxury goods industry: surveys carried out in France, Germany, Italy, UK and Spain”, TNS - SOFRES, September 2009.
10 Statement at Altagamma Monitor conference held in Milan on 18 October 2010.
B. E-COMMERCE IS ONE OF THE KEY GROWTH DRIVERS OF LVMH’S BUSINESS

The digital strategies of LVMH’s Brands enable our customers to discover the richness and diversity of the highest quality craftsmanship and creativity across channels creating an emotional engagement. We believe that the internet as we know it is just one part of the digital revolution that is underway. As digital content becomes more ubiquitous, sophisticated and accessible across a range of platforms and devices, our Brands will be able to develop exciting new ways of interacting with and reaching our customers.

LVMH strongly believes that e-commerce is a key element of its business model going forward, as demonstrated by some of the case studies below. However, the development of e-commerce in Europe is currently hindered by several barriers. In our contribution below LVMH will outline the barriers that it has identified based on its practical experience, and suggest some priority focus areas for the European Commission. Specifically, we believe actions need to be taken in order to remove structural and regulatory barriers, including payment systems, VAT rates and registration procedures and create efficient EU-wide postal services to boost e-commerce (Section II).

More fundamentally, we believe the lack of protection and certainty for the consumer online is the biggest obstacle to e-commerce growth due to the lack of clear responsibilities along the digital value chain. We believe it is of the utmost importance to clarify the liability exemption regime granted by the ECD to “basic” online service providers to increase legal certainty online and consumer trust (Section III).

With leadership comes responsibility and LVMH takes seriously our commitment to those who purchase our brands online. We see it as our obligation to offer them similar assurances that they expect when they shop in physical stores. LVMH strongly believes the internet is a fundamental tool and channel for increasing the competitiveness of European businesses. It is therefore of paramount importance to establish a legal framework that allows companies to operate with full legal certainty both offline and online with respect to brand and consumer protection allowing European consumers to feel confident when operating in the digital environment.

11 More generally, for the development of the digital environment we also believe data privacy and data protection laws need to be adapted to the online world. In addition, we believe that net neutrality provisions need to be in place to prevent discrimination vis-à-vis traffic and that all consumers in Europe are able to experience our products and websites online in the same manner. Furthermore standards guaranteeing interoperability along platforms and devices are critical for the consumer to continue to benefit from the growth of the digital sector. It is essential we avoid lagging behind the US and Asia in this regard. See LVMH’s submission to the public consultation on the open internet and net neutrality launched by DG for Information Society and Media (COM (2010) 183), 30 September 2010.
C. CASE STUDIES OF LVMH BRANDS AS ONLINE PIONEERS

Case Study:
Benefitcosmetics.com leverages social media to drive purchase decisions

Cosmetics manufacturer Benefit recognised early on that consumers shopping for beauty products through e-commerce sites and at traditional brick-and-mortar stores do a good deal of online research before making a purchase. Consumers use the web to learn what “experts” on blogs and social media outlets have to say about a product, as well as reach out to their online network of friends for advice. Moreover, consumers are placing greater trust in these sources than in what they learn through traditional advertising campaigns.

To reach consumers more effectively, Benefit therefore engages with bloggers and top contributors on ratings and reviews, and allows its own customers to become advocates for the brand by giving them a forum to share their own recommendations and experiences with specific products. Benefit continues to focus on fostering dialogue about its products online and capitalises on the ever-growing reach of social media sites. In fact, Benefit was one of the first companies worldwide to integrate customer-submitted ratings and reviews with its Facebook social media fan page. Since launching its ratings and reviews feature in June 2010, Benefit has seen thousands of reviews shared via Facebook.

Social ratings and reviews have allowed Benefit to drive loyalty among existing customers and to reach new customers who have learned from their friends about Benefit products.
Case Study:

TAG Heuer continues to be a benchmark in the digital landscape

TAG Heuer is an internet pioneer, having launched its corporate website in 1995. The company’s site quickly became a benchmark in the digital landscape. It is not only the most visited site in the industry, but also a source of inspiration for the entire watch-making sector on the web. TAG Heuer introduced 3D views of all its timepieces right from the initial version of the tagheuer.com website. Today, augmented reality enables customers to see how a watch actually looks on the wrist. And TAG Heuer took things to the next level, by launching its first iPhone app, an innovative way to discover the Monaco V4, thanks to real-time 3D engine.

Drawing on its wealth of online experience, TAG Heuer will roll out a new site in late 2010, featuring a vibrant contemporary feel and exciting innovations. There is a focus on localised content for different regions as well as personalised content for each individual visitor. The site’s navigation integrates touchscreen interfaces, and will soon be available on smartphones and the iPad, enabling visitors to enjoy the TAG Heuer online experience wherever they are. The new site creates a total immersion into the TAG Heuer universe for a memorable visit, including magnified views of products, a tour through TAG Heuer’s remarkable history and the many technological challenges it has met. For a complete customer experience there are also online shops and customer support, plus cost estimates, a service that has met with great success since the launch.

Social media sites also enable TAG Heuer aficionados to enjoy a truly personalised relationship with the brand. An international, segmented strategy has been deployed to share our brand passion with bloggers, collectors and all those who follow TAG Heuer.

This new strategy propels TAG Heuer to the forefront of the digital world, establishing an exciting new standard for luxury on the web.
Case Study:

NOWNESS.com brings user interaction with luxury content to a new level

In addition to the e-commerce activities of its Brands, LVMH launched NOWNESS.com in early 2010. NOWNESS is a unique and editorially independent web platform, which each day showcases an exclusive premiere of the most inspiring stories influencing contemporary arts and global lifestyle. This includes previews of the latest in fashion, art, cinema, music, design, travel, and global luxury. To do this, NOWNESS’s editorial staff collaborates with the world’s foremost designers and creative minds in the luxury industry, in order to be a vital inspiration and resource for experiencing high-end fashion and culture digitally and to engage with luxury and lifestyle consumers. The creative concept of NOWNESS.com is a concept of “Open Luxury”. Obviously, the new digital landscape is open as users are more willing to share, discuss, and participate. At the same time, luxury conveys core values, such as excellence, passion, savoir-faire, heritage and emotion. NOWNESS.com is an environment for premium Brands to be showcased in a chic and elegant way that evokes emotions.

NOWNESS.com also enables users to customise their discovery of the richness and diversity of luxury and lifestyle. When users click through the site, they receive tailored recommendations. Specifically, when a user views a page, they have the choice to click “LOVE” or “DON’T LOVE.” Then, through the functionality of the site, users are guided to specific content based on the preference they have shown through their “LOVE” or “DON’T LOVE” votes. This function enables a web user to navigate content and stories, and to explore the new possibilities offered by digital innovation.

Additionally, new interactive interfaces enable the user to explore, for instance, the content by popularity ranking on a site map and discover easily which stories are the most loved by NOWNESS users across the globe. NOWNESS is also the first community of luxury and lifestyle creators submitting content to be loved by our users.
Case Study:

Louis Vuitton.com brings history alive online


The digital team is in the process of launching a new platform that will be available in nine languages and offer seven e-commerce versions to support transactions.

The site celebrates the history and heritage of the Louis Vuitton brand, by showing images and sharing stories from its earliest days, and offers a broad range of information and imagery regarding its extensive cultural activities, supporting artists and performance through the Espace Culturel Louis Vuitton. At the same time it honours Louis Vuitton's enduring appeal, by producing original and exclusive content designed for the digital environment, including extending its newest advertising campaigns shot by the world's top photographers to an online format, feeds of their runway shows and exclusive videos created by exceptional individuals ranging from Mikhail Gorbachev to Bono who have aligned themselves with the brand. The site also offers the full range of Louis Vuitton products, and the ability to personalise certain items.

LouisVuitton.com's leadership has been widely acknowledged. According to the September 2009 “Digital IQ” rankings, designed by the I2 Luxury Lab of the NYU Stern School of Business, LouisVuitton.com ranked #1 in the fashion category and ranked #6 globally amongst 109 premium Brands. It was cited as setting the bar in the integration of digital, social media, e-commerce, editorial and mobile. Louis Vuitton has also been an early mover in the luxury industry in terms of social media, beginning with being the first brand to broadcast a fashion show live on Facebook. Since then, Louis Vuitton has remained a leader in the use of social media among luxury players. The brand is in the top 5 luxury social channels on Facebook, the leading luxury TV channel on YouTube and the top luxury channel on Twitter and Foursquare.
Case Study:
Sephora.com extends web leadership into major mobile initiative and Latin American expansion

Sephora.com is the largest prestige beauty products site in both the US and France (as early as 1999 in the US). Moreover, Sephora.com is the best performing Sephora store in the US and second largest store in France.

The enormous appeal of its site reflects Sephora’s success in bringing alive online its signature store experience, defined by the wide range of Brands it offers and the extensive information provided by deeply knowledgeable sales associates. And now, in the US, beauty fanatics do not even need to wait to get to a computer to access the site. They can do it straight from their mobile phones. In fact, the SephoraMobile site was created because Sephora recognised the potential of its mobile business and asked the 700,000 fans on its Facebook page to submit their ideas for Sephora’s first-ever mobile application. In summer 2010, Sephora.com in the US launched its new mobile site with the features its customers wanted, ranging from ratings and reviews to notifications about new products and personalised product recommendations. This entailed leveraging technologies that had never been used before by the beauty sector, and there has been an exceptional client response to the innovation and excitement that SephoraMobile offers. Today nearly 10% of Sephora’s US customers shop through SephoraMobile, and that number is growing due to the rapid pace of adoption of mobile shopping.

Sephora is also capitalising on its extensive online expertise through LVMH Group’s recent acquisition of Sack’s, which is the top online beauty seller in Brazil, one of the fastest growing and highest potential beauty markets in the world. Sephora will seek to expand Sack’s business by expanding the range of Brands it offers and, over time, establishing a brick-and-mortar presence to complement its e-commerce offering.
D. RULES ON SELECTIVE DISTRIBUTION PROVIDE STRONG SUPPORT FOR ONLINE SALES OF LUXURY PRODUCTS

One of the pillars underpinning the success of the luxury industry in Europe is the ability of manufacturers to choose how to distribute their products. The European Commission affirmed this in the recently adopted Regulation 330/2010 and its Guidelines, which confirm the freedom of manufacturers to choose their business models and, notably, to have recourse to a selective distribution network of authorised retailers if they believe it to be useful. The European Commission confirmed that this is particularly critical with regard to the luxury industry considering the special nature of luxury products, i.e., not only their material characteristics but also their allure and prestigious image which bestow on them an aura of luxury.

Crucially, this is supported by European citizens. A September 2009 survey from TNS-SOFRES clearly shows that European consumers have strong ideas about how luxury goods should be sold. 72% of consumers believe luxury goods should be sold in stores with dedicated brand retail staff and through dedicated brand websites.

The ability of manufacturers to choose their business model applies across all channels in the EU Single Market, including any online and offline channels. Specifically with regard to e-commerce, Regulation 330/2010 and its Guidelines provide that a retailer must always be free to use the internet to sell the contract goods. At the same time, the rules confirm settled case-law according to which a supplier can freely choose its authorised retailers and control the way contract goods are sold offline and online. This includes the possibility for a supplier to require its retailers to operate a brick-and-mortar shop to become a member of its selective distribution network or to require its retailers to meet qualitative criteria when selling contract goods online.

Courts at both the EU and national levels as well as the European Commission have consistently recognized selective distribution of luxury products as a legitimate requirement which serves to provide a prestigious and high-quality selling environment to fulfil the expectations of the consumer who is purchasing not just the physical product but also the aura of luxury and the experience associated with superior sales and after-sales services. Consumers agree: when asked specifically about luxury products being sold through discount stores or non-specialist web platforms and if this would affect their cachet, 65% believed that it would indeed affect their cachet.

12 Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (OJ L 102/1) and European Commission Guidelines on Vertical Restraints (2010/C 130/01)

13 See para. 176, Vertical Restraints Guidelines

14 See “European perceptions of the luxury goods industry: surveys carried out in France, Germany, Italy, UK and Spain”, TNS – SOFRES, September 2009.

15 Ibid.
II. STRUCTURAL AND REGULATORY BARRIERS TO THE DEVELOPMENT OF E-COMMERCE IN EUROPE

The following section outlines our overview of the structural and regulatory barriers to e-commerce that our Brands face regarding cross-border e-commerce.

As the European Commission identified in 2009, cross-border e-commerce in the EU is the least developed due to barriers relating to “language, demographics, individual preferences, technical specifications or standards, internet penetration or the efficiency of the postal or payment system”, on top of the mechanisms that prevent consumers from placing orders in one country from another.16

The European Commission has rightly pointed out that these obstacles have created a fragmented e-commerce internal market. For businesses there is a number of practical and economic obstacles, some of which have regulatory underpinnings and which are experienced by our Brands across Europe as they try to develop their e-commerce activities. Regulatory barriers result in significant compliance costs and administrative burdens for businesses, which considerably diminish the appeal or feasibility of cross-border expansion. It is crucial to address these potential market barriers in order to ensure that future growth is not stymied and to unlock the potential of cross-border e-commerce.

As the European Commission notes in its 2009 report on E-Commerce, “the gap between domestic and cross-border e-commerce is widening: from 2006 to 2008, the share of all EU consumers that have bought at least one item over the internet increased from 27% to 33% while cross-border e-commerce remained stable (6% to7%).”17 Similarly, the report points out that for businesses “51% of EU27 retailers sell via the internet, but only 21% are currently conducting cross border transactions, down from 29% in 2006 (in the EU25).”18

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16 Report on cross-border e-commerce in the EU (SEC(2009) 283 final)
17 Ibid p. 6
18 Ibid p. 6-7
Our Brands have experienced the effect of the practical barriers to cross-border e-commerce in Europe identified by the European Commission (e.g., these barriers were significant enough to delay the launch of a www.sephora.eu site by almost two years). The most significant barriers for our Brands are the following and we ask the European Commission to work on greater harmonisation in these areas.

1. Improving payment systems across Europe to increase interoperability

Currently the lack of interoperability of payment systems in Europe, in addition to the lack of a choice of safe payment systems online (both for the consumer and retailer), is one of the significant barriers to cross-border e-commerce.

We ask that the European Commission helps to facilitate the further development of systems that mitigate the risk of online payments and stimulate the interoperability of payments systems in Europe.19

We believe that better online identification schemes, coupled with international cooperation to combat digital crimes will also build further trust with businesses and consumers in this area.

2. Simplify the VAT reporting obligations and harmonise VAT rates

Our Brands have found that diverging VAT rates and excise tax, coupled with the charges linked to the handling of the VAT and excise tax procedures and the registration regime itself are important practical barriers to e-commerce.

The European Commission has rightly identified this as a barrier in 2009 already, particularly if Brands are required to register with the tax authorities in the countries where their sales exceed the threshold and pay the applicable rate in those countries.20 These VAT rates and thresholds vary depending on the country, which is complicated for sellers to grasp and also imposes significant administrative burdens. We ask the European Commission to push for a harmonisation of VAT and excise tax and of VAT and excise tax reporting procedures and for a reduction of the administrative burden related to these.

19 We note that payment systems have already been the focus of EU action aimed at increasing interoperability and creating a seamless cross-border market, either through legislation (Directive on Payment Services) or by supporting industry-led initiatives (the Single Euro Payments Area). See Report on cross-border e-commerce in the EU (SEC(2009) 283 final), p.11. However, we believe more needs to be done in that respect.

3. The fragmentation of consumer protection rules

Our Brands offer a superior level of customer service both online and offline, and we believe that providing the same level of service to all consumers across Europe is critical. However, the lack of harmonised consumer rights provides a source of uncertainty and confusion for consumers wanting to make cross-border purchases, as well as for our Brands when they seek to sell cross-border.

We call on the European Commission to continue the work on a harmonised set of rules in Europe with the aim of providing clear, consistent rights to consumers across Europe both online and offline.

4. Delivery systems and shipping costs

At the heart of any e-commerce site is the need for reliable and secure shipping and postal services. Currently the situation in Europe is too fragmented, and there is a lack of choice of reliable postal services that can operate across borders in Europe. One of the results is that shipping costs across borders are artificially high and do not relate to the actual distance covered.

We believe that the European Commission should facilitate the Europe-wide liberalisation of postal services for the sake of the Single Market in general and for the development of e-commerce specifically.

5. Law enforcement and cyber crime

We believe a lack of investment in law enforcement to fight against cyber crime will be detrimental to the growth of e-commerce. It is therefore of the utmost importance that all stakeholders, including right owners and service providers, as well as relevant government agencies and authorities take the necessary steps to ensure efficient and proper law enforcement online in Europe through dedicated human, technical and financial resources in order to increase legal certainty and consumer trust.

6. Global approach to e-commerce

LVMH believes that the European authorities should work closely with their counterparts on a global basis, in particular with the US and China, to boost e-commerce. The global reach of the internet suggests the European legal framework needs to take into account the challenges outside European borders. This is all the more true with respect to the liability regime applicable to online service providers (see below).
III. THE MAIN BARRIER:
LACK OF CLEAR RESPONSIBILITIES
ALONG THE DIGITAL VALUE CHAIN HURTS
CONSUMER TRUST IN E-COMMERCE

LVMH considers that, like in the offline environment, opportunities and responsibilities must be shared among operators along the digital value chain, in consideration of the economic and business realities of each operator's business model. However, the development of e-commerce in Europe is currently hindered by a lack of clear responsibilities along the digital value chain.

We believe the biggest obstacle to the development of e-commerce today is that consumers and businesses do not have legal certainty, which constrains their trust when operating online. Only if legal certainty and consumer trust can be increased, will e-commerce, and particularly cross-border e-commerce, thrive in Europe.

LVMH considers that there is a need for a clarification of the liability exemption granted to online service providers without reopening the ECD (A).

As explained below, LVMH proposes the European Commission clarifies that in the event online service providers do not limit their activities to mere storage and transmission of data at the direction of a user but rather go beyond that, by actively using, presenting, organising or modifying users’ materials for commercial purposes, such online service providers do not qualify as hosting providers within the meaning of the ECD (B).

They cannot benefit from the liability exemption regime and are under a duty to reasonably act as careful and diligent business operators in order to detect and prevent online illicit practices, in addition to promptly remove or disable access to illicit content upon obtaining knowledge or awareness of such illicit content.
A. NEED FOR A CLARIFICATION OF THE LIABILITY EXEMPTION GRANTED TO SOME ONLINE SERVICE PROVIDERS

The original intent of the ECD was to create a “safe harbour” for basic online service providers that have a purely technical, passive and automatic role. The aim at the time was to promote the rapid and efficient development of the internet (1). We will refer to these online services that have a purely technical, passive and automatic role as “basic” services in our contribution below. However, this original intent has been diverted in practice by a myriad of online service providers claiming to act as basic online service providers in order to elude responsibility along the digital value chain (2). The result is that e-commerce in Europe is characterised by confusion and uncertainty for market participants (3).

1. The ECD original intent: creating a liability exemption regime to enable the efficient mere storage or transmission of data

The European Commission’s policy intent behind the liability exemption was that online service providers providing these “basic” services, i.e., purely technical, passive and automatic services within the activities of “mere conduit”, “caching” and “hosting” should not be held liable for the infringing content of the data they store or transmit. If “basic” online service providers, such as Internet Service Providers (ISPs), were required to monitor the content of millions and millions of data bits, this cumbersome burden would have prevented the rapid and efficient development of the internet. The concept of “hosting” is effectively defined in Article 14 ECD as consisting in the activity of “storage of information”. This focus on storage is consistent with Recital 42 of the Directive, which refers to information which is “transmitted” (which is caught by the “mere conduit” exemption in Article 12) and “temporarily stored” (caused by the hosting and caching exemptions in Articles 13 and 14); as well as the preparatory works relating to the Directive.

It is clear that the policy intent was to limit liability for those online service providers storing or transmitting data. This is why the liability exemption regime granted to “basic” online service providers is strictly limited in content and scope with the clear goal to

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21 These service providers of basic online internet services are: (i) "mere conduit" services that consist of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network (Article 12 ECD), (ii) "caching" services that consist of the automatic, intermediate and temporary storage of the information provided by a recipient of the service in a communication network of information (Article 13 ECD), and (iii) "hosting" services that consist of the storage of information provided by a recipient of the service (Article 14 ECD).

22 As a result, Article 15 ECD prevents Member States from imposing on online providers, with respect to activities covered by Articles 12-14, a general obligation to monitor the data which they store or transmit or a general obligation to actively seek out facts or circumstances indicating illicit activities.

23 There seem to be limited issues in practice concerning application and interpretation of the liability exemption with respect to "mere conduit" (Article 12, ECD) and "caching" (Article 13, ECD). An exception is the relationship between Article 12 ECD and the Telecom Directives, notably with respect to data privacy regimes to be applied (See Liability Report, 2007, p. 13).

24 Given the nature of the internet, it might be considered that the concept of "storage" may be best understood as being the following function: storage per se, the representation of the information/data that is stored (i.e., on-screen representation of the data for internet users), and the degree of information processing necessary to achieve that.
III. The main barrier: lack of clear responsibilities along the digital value chain hurts consumer trust in e-commerce

ensure the efficient development of the internet from a technical standpoint, as clearly provided by Recital 42 of the ECD:

“exemptions from liability established by this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient: this activity is of mere technical, automatic and passive nature, which implies that the information society service has neither knowledge of nor control over the information which is transmitted or stored”.

This was confirmed by the European Court of Justice (ECJ) in its ruling of 23 March 2010 in the Google / Louis Vuitton case, which held that the Article 14 ECD hosting defence applies to an internet referencing service provider “in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored”.25 The ECJ also stated that in order to establish whether the liability of an internet referencing provider may be limited under Article 14 ECD, it is necessary to examine whether the role played by the service provider is “merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”

Under Article 14 ECD, hosting providers only play the role of technical intermediaries in the storage of data; they operate their hosting services on an exclusive basis, i.e., their services are “limited” (cf. Recital 42) to the technical process of data transmission; and they do not have knowledge of or control of the data transmitted or stored. If hosting providers meet these criteria, they should legitimately benefit from the “safe harbour” provision.

This liability exemption regime is an uncommon exception to the general rules governing merchants’ liability.

It is a fundamental principle under every legal system in Europe that any merchant has a duty of care in order to avoid that its activity or conduct generates illicit damages to third parties. The required standard of conduct is that of a reasonably careful and prudent merchant in the circumstances depending, in particular, on the nature and value of the protected interests involved, the expertise to be expected, the threat of the potential damage as well as the availability and the costs of precautionary or alternative methods. If such a duty of care is found to be breached, the merchant must be held liable to compensate the victim for the damages that may have been incurred as a result of the breach.

25 ECJ joined cases 23 March 2010: Google France, Google, Inc. v Louis Vuitton Malletier (C-236/08), Viaticum SA, Luteciel SARL (C-237/08), CNRRH, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08).
However, the liability exemption granted to providers of "basic" online services is not "borderless". "Basic" online service providers can still be held liable every time they have knowledge of or are aware of illicit content or material on their websites, and when they do not act promptly to remove it or disable access to it. This can be the case when they are notified by right owners of infringing material posted on their websites. As mentioned below, LVMH submits that harmonised notice and take-down ("NTD") procedures should be implemented at the EU level that would apply to all online service providers, including "basic" online service providers that benefit from the liability exemption regime. 26

"Basic" online service providers, i.e., those which merely provide the basic services described under Articles 12-14 ECD, still exist and are important and needed for the purpose of offering the technical means for efficient internet services (such as, "cloud computing" providers). They have proven to be instrumental in the development of the internet, for which they need to be encouraged to continue going forward.

2. The current situation: the liability exemption has been diverted from its original purpose to the detriment of European consumers

Significant technological developments on the internet have led to the emergence over the last ten years of a myriad of new online activities and services that are provided by online service providers. While these often are useful and welcomed by both consumers and businesses, it is undisputed that they are developed in addition to the "basic" services described in Articles 12-14 ECD, for instance when facilitating commercial transactions or providing recommendations and targeted marketing outreach.

These additional services are generally commercial activities, supported by advertising, which go beyond the mere storage or transmission of data and are not in fact passive, automatic and technical in nature. They constitute a new source of profit for the online service provider apart from the legitimate remuneration for the mere "hosting" services. As any business operator in a competitive market, the online provider seeks to actively increase and optimise such profit by always actively creating and developing new functionalities and services on the basis of the data stored.

26 See below, Section III.B.2. It should be kept in mind that "basic" online service providers within the meaning of the ECD are under no general obligation to monitor the information they transmit or store nor a general obligation to actively seek facts or circumstances indicating illegal activities. As explained below, the European Commission could therefore propose harmonized NTD procedures that are strengthened for "basic" online service providers within the meaning of the ECD to protect the "safe harbor" legitimately recognized by the ECD, compared to softer and less burdensome harmonized NTD procedures for other online service providers which are under a duty to act as careful and diligent operators to prevent illicit activities online.
However, in many instances, online service providers carrying out commercial activities that go beyond basic storage of data claim that they must be considered as “hosting” providers within the meaning of Article 14 ECD because they also offer basic online services. Based on this, these providers further claim they should benefit from the “safe harbour” provisions of the ECD and thus be exempted from any liability. ²⁷

This means that in practice these intermediaries consider they do not need to control the content of their sites, which they do not monitor. This lack of responsibility for their services provides an opportunity for illicit practices online to grow, harming consumers and businesses in the process. Counterfeiters, unfair competitors, organised crime and a new generation of businesses capitalising on these practices to the detriment of consumers can exist more easily online as a result.

Below are some examples of illicit acts or materials that directly have hurt both consumers and our Brands. These illicit acts or materials are the direct result of new functionalities actively developed by online service providers for which they make profit but refuse to assume responsibility, to the detriment of consumers and businesses.

**Trademarks sometimes are used in paid referencing systems without the consent of the trademark owner, which misleads consumers**

A **striking example is the active sale by search engines of trademarks – such as Louis Vuitton – as ad triggering keywords to third-party advertisers without the consent of the trademark owner.**

Companies invest a great deal in developing their products and promoting their trademarks and it is legitimate that they try to protect them from abuses. In the offline environment, it is well established that a company can prevent its trademarks from being used by a competitor to boost its own sales. However, this is what is happening with online paid referencing systems, which allow the use by any third party advertiser of a registered trademark without the consent of the trademark’s owner in order to generate sponsored links and take advantage of them to attract new clients.

This compromises two essential functions of trademarks, as a guarantee to consumers concerning the origin of goods and services, and as a means of preventing companies from taking unfair advantage of the good reputation of others. Moreover, it ultimately hurts consumers who should be able to search for a brand’s product without being misled to websites selling lower quality, competitors’ or counterfeit products. Equally, companies should not have to fear that their trademarks are being misused on the internet to lead consumers to unrelated or illegal websites.

²⁷ It should be noted that it seems that issues have mainly arisen from the undue qualification of “hosting” service provider within the meaning of Article 14 ECD. There seem to be less problems concerning the application and interpretation of the “safe harbor” provisions to mere conduit and caching service providers. See “Study on the liability of internet intermediaries”, 12 November 2007, at p. 12-14.
Online auction sites may offer blatant counterfeit goods or sell goods in violation of the selective distribution networks put in place by Brands to ensure quality and security for consumers

The online sale of counterfeit goods is one of the most crucial issues faced by brand owners – including LVMH Brands – when it comes to e-commerce. Counterfeiting has a dramatic and damaging effect on consumers and businesses and its production processes do not comply with social, ethical or environmental standards. While the internet is not in itself the source of counterfeiting, it has nevertheless become an important vehicle for the sale of fake goods worldwide. Its global reach and accessibility, the possibility for traders to remain anonymous and for offers to be placed and withdrawn instantly has made it one of the most attractive channels for the sale of counterfeit goods, in particular through online auction sites without any control.

In addition, products from LVMH perfumes and cosmetics Brands – such as Givenchy, Kenzo or Guerlain – are regularly sold on online auction sites in violation of the selective distribution networks put in place by the Brands. Such selective distribution networks are continuously endorsed by the Court of Justice and the EC as a legitimate tool for a brand to ensure the quality and the security of products for consumers offline and online, while protecting the value of the brand. Selling on online auction sites unboxed perfumes or cosmetics products, which might have been refilled with unknown and dangerous products or liquids, puts the consumer’s safety at risk. Similarly, counterfeit Dom Pérignon champagne has been offered for sale online without any control in violation of the most basic rules for consumer protection and safety.

Blogs and social media sometimes do not take adequate measures to prevent online illicit activities, which can damage both consumers and businesses

LVMH-owned Krug, one of the most prestigious champagne Brands, has been directly hurt by bloggers which referred with visual support to an ad campaign that Krug has never launched and involving celebrities while (i) the rights granted to Krug had expired and (ii) the visuals did not comply with the restrictive French legislation on alcohol advertising. The blogs also contained a link to a video-sharing website where it was possible to watch the video of the campaign for which Krug’s rights had expired as well. Both the blog operators and the video-sharing website acted with negligence and did not take any actions to prevent such damaging and illicit practice.
Domain names, including well-known trademarks, may be offered for sale via online auction systems without the consent of the trademark owner

Sedo is a German-based online auctioneer of domain names and parking pages. Les Echos, a newspaper owned by the LVMH Group, found that Sedo organised - without its consent – the online sale of a significant number of domain names using signs identical or similar to its well-known trademarks across Europe, such as, “les-echos.fr”, “lesechos.de”, “echos.co.uk”, “lesechos.de”, “echos.eu”, etc., which were “parked” by Sedo. For a significant number of these domain names, Sedo embedded hypertext links of advertising of competing products or services.

These are only a limited number of examples of the kind of illicit acts or materials that can arise due to the lack of control of the activities of online service providers, and for which online service providers do not want to assume responsibility.

3. The result: confusion and uncertainty for consumers and businesses

The varied interpretations of the concept of hosting across European jurisdictions are a clear source of confusion and uncertainty for market participants. The case-law across Europe on this point is marked by its inconsistency – with a series of national cases limiting the scope of the protection for online service providers while cases in other jurisdictions take the opposite stance. This confusion and lack of clarity concerning who should bear responsibility for online illicit practices have led to a proliferation of court cases with different outcomes among – and even within Member States – with regard to the interpretation of the liability exemption provided in the ECD. In some cases, national courts have been inclined to consider that online service providers could qualify as hosting providers and benefit from the “safe harbour” provisions even though they actively perform activities that go beyond the mere storage and transmission of data. Conversely, other national courts, sometimes within the same Member State, have ruled that the same online service providers could not qualify as hosting providers and would fall outside the “safe harbour” regime. This lack of clarity is illustrated by the significant number of national court cases pending before the ECJ seeking guidance on this matter.

28 See “Study on the liability of internet intermediaries”, 12 November 2007

29 A significant number of cases relating to the ECD are pending before the ECJ, including in particular the L’Oreal / eBay case (questions referred by the High Court of Justice of England and Wales) which directly refers to the liability exemption issue.
Critically, online service providers themselves appear to be confused as to their status and some have changed their status according to the legal case being argued. For example, in the eBay / Conseil des Ventes Volontaires decision, eBay claimed it is an online broker as it wanted to avoid being qualified as an auction house under French law due to the strict legal regime attached to it.30 Conversely, in the eBay / LVMH decisions, eBay claimed that it was not an online broker but a mere hosting provider (which was finally rejected by the Court which confirmed that eBay is an online broker).31

Similarly, the leader in the paid referencing market in Europe generally claims to be a hosting provider to benefit from the liability exemption regime. However, this online service provider also claims not to be a hosting provider but a publisher (notably where the claimant sued on defamation grounds) to take advantage of the provisions of the French law on Freedom of Press and, again, escape liability: “[Google] does not challenge the fact that it provides a service of online communication accessible at www.google.fr and that it has the quality of publisher of this website in connection with the proposals made by the suggestion tool [Google Suggest]”.32

What is clear is that the current situation is characterised by confusion and a lack of clarity within the EU, which leads to various interpretations of the ECD provisions. This lack of harmonisation is inconsistent with (i) the definition of what should be achieved via adoption of Directives at the EU level33, (ii) the aim and spirit underlying the EU and in particular the Single Market necessitating equivalent rules, and (iii) the goals of the ECD itself, which was intended to “lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market [...] in order to ensure legal certainty and consumer confidence”.34

LVMH believes it of the utmost importance to clarify the liability exemption provisions to increase legal certainty and consumer trust without reopening the ECD.

30 See TGI Paris, eBay / CVV, 25 May 2010
31 See CA Paris, eBay / IV, eBay / CDC, eBay / Parfums Kenzo, Givenchy, Guerlain, 3 September 2010
32 See TGI Paris, Google Suggest, 10 July 2009
33 See Article 288 of the Treaty on the Functioning of the European Union: “[t]o exercise the Union’s competence, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. (...) A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authority the choice of form and methods (...)”.
34 ECD, Recital 3
B. LVMH PROPOSAL: CLARIFYING THE LIABILITY EXEMPTION PROVISIONS TO INCREASE LEGAL CERTAINTY AND CONSUMER TRUST WITHOUT REOPENING THE ECD

The European Commission, and indeed the European Parliament are aware of the difficulties identified above and have already voiced a need for clarification of the liability regime of online service provider in Europe. The European Commission has stated in its Digital Agenda that "it may be necessary to update provisions such as limited liability of information society services in line with technological progress". Similarly, the EU 2020 strategy calls on EU and national legislation to be adapted to the digital era, including updating rules on liability.

The European Parliament also supports this approach in its recently adopted Report on the Development of E-Commerce in which it calls for the European Commission to update “the rules on the limited liability of information society services so as to keep up with technological progress, in the context of the e-commerce directive”. LVMH believes it is critical to urgently return to the original and legitimate policy intent behind the ECD without reopening the Directive.

LVMH proposes that, in the event online service providers do not limit their activities to mere storage and transmission of data at the direction of a user but rather go beyond that, by actively using, presenting, organising or modifying users’ materials for commercial purposes, such online service providers do not qualify as hosting providers within the meaning of the ECD.

They cannot benefit from the liability exemption regime and are under a duty to reasonably act as careful and diligent business operators in order to detect and prevent online illicit practices, in addition to promptly remove or disable access to illicit content upon obtaining knowledge or awareness of such illicit content.
Would the LVMH Proposal work?

As explained above, LVMH proposes that in the event online service providers do not limit their activities to mere storage and transmission of data at the direction of a user but rather go beyond that by actively using, presenting, organising or modifying users’ materials for commercial purposes, such online service providers do not qualify as hosting providers within the meaning of the ECD. They cannot benefit from the liability exemption regime and are under a duty to reasonably act as careful and prudent business operators to detect and prevent online illicit practices, in addition to promptly remove or disable access to illicit content, upon obtaining knowledge or awareness of such illicit content.

LVMH believes the proposed clarification of which online service providers qualify or not as hosting providers within the meaning of the ECD would help to safeguard consumers online and should be endorsed by the European Commission for the following reasons:

- **This approach requires no rewriting of the Directive.** It is consistent with the existing language of the Directive, the policy intention behind the Directive, and with various court judgments in different Member States as well as the ECJ that have sought to address this issue. LVMH’s proposal requires a mere clarification of what is already on the face of the Directive, which could be achieved, for example, through an interpretative communication from the Commission.

- **This approach is legally supported by the strict interpretation principle of exceptions.** The “safe harbour” defence is an exception to the general principle of tort and/or contractual liability. As with any exception, it should be interpreted narrowly and strictly defined not to benefit entities or activities that do not meet the required tests.38

- **This approach is consistent with the economic and business realities of these online service providers’ business models** and can be positioned as a practical step. These online service providers are not neutral but rather play an active role, which gives them knowledge and control of the data stored for profit. Each time an online service is actively involved in a transaction on its site, the service provider should take on a degree of responsibility.

38 See CA Reims, 20 July 2010, eBay France et International / Hermès International, Cindy F. The court ruled that “the liability exemption regime is a regime which is derogatory from common law and this exception must be strictly interpreted.”
This approach is a balanced and careful response that does not go as far as in other sectors in terms of responsibility along the value chain. This approach is respectful of the online service providers’ rights. The fact that online service providers do not qualify as hosting providers within the meaning of the ECD does not mean that they are liable ipso facto for any online illicit act or material. The specific conditions under which their liability might arise must be sought in the context of the relevant national law on tort liability, unfair competition or honest practices in industrial and commercial matters.39

This approach is a careful and thoughtful response that will reinforce the credibility of the online service providers because their economic power will be reinforced by legal certainty, which ultimately increases consumer’s trust.

This approach would not prevent cooperation between all stakeholders ensuring the efficient protection of intellectual property rights online in order to increase consumer trust and further the growth of e-commerce in Europe. If online service providers take on a degree of responsibility for their websites, right owners should encourage a spirit of cooperation: online service providers have control over their own tools (for example an auction site), and right owners are experts in their rights (trademarks, copyrights, etc.). Therefore, right owners could be requested to take commercially reasonable and available steps to also effectively fight online illicit practices (e.g., by providing and updating general information to online service providers about those products which are particularly susceptible to online illicit practices). LVMH believes that this approach will clarify the responsibilities along the digital value chain and will therefore increase legal certainty and consumer trust.

39 ECJ, Google, at para. 107
In order to facilitate the application of the above proposal, we would like to suggest the following essential elements, which need to be put into place.

1. Duty to reasonably act as careful and diligent business operators to detect and prevent online illicit practices

As mentioned above, LVMH proposes that, in the event online service providers do not limit their activities to mere storage and transmission of data at the direction of a user but rather go beyond that, by actively using, presenting, organising or modifying users' materials for commercial purposes, such online service providers do not qualify as hosting providers within the meaning of the ECD. They cannot benefit from the liability exemption regime and are under a duty to reasonably act as careful and prudent business operators to detect and prevent online illicit practices.

What LVMH proposes

In practice, this means that online service providers should take any measures, technical or procedural, automated or non automated, including the associated procedures and processes, aimed at the timely prevention and adequate response to attempts to perform illicit acts online as soon as technically and reasonably feasible.

In particular, online service providers’ duty to reasonably act as careful and prudent business operators should include the implementation of appropriate, commercially reasonable and technically feasible measures, to identify and/or prevent proactively illicit acts online from taking place such as the infringement of intellectual property rights or the violation of selective distribution networks.

Examples of such preventive and proactive measures could be:

i. Web users’ identity: Online service providers should take commercially and technically reasonable steps to request genuine and accurate information from the users of their services and to verify this information in order to gain a reasonable assurance of their identity.

ii. “Fake/replica/etc.” + brand: Online service providers (such as auction sites or paid referencing providers) should proactively filter and block any posts or keywords that contain words, and their most common variations and misspellings, which usually indicate that the products associated with them are not original goods (such as “fake”, “replica”, “knock-off”, “-70%”, etc.), used alone or in connection with a trademark or other distinctive sign.
iii. Selective distribution: Online service providers (such as auction sites or paid referencing providers) should proactively filter and block any posts or keywords relating to the promotion or sale of products that can only be legally sold within selective distribution networks by authorised retailers (such as trademarked perfumes and cosmetics) in the event the seller is unable to prove that it acts as an authorised retailer.

iv. Patterns of infringement: Where a right owner notifies an online service provider that sellers are offering for sale counterfeit products under a particular trademark, where it is possible to confirm that they are counterfeit products (e.g., by reference to a particular photograph and a “trap” purchase, or to the photograph being of a fake item), the online service provider should remove and filter all offers that conform to that pattern in the future.

v. Monitoring of sellers’ behaviour: Where a seller tries to sell unusual amounts of goods that are known to be frequently counterfeited goods (such as, watches, handbags, jewellery, etc.) or known to be sold in violation of selective distribution networks (trademarked perfumes or cosmetics), an alert could be triggered and the registration process stalled for further investigation before approval once the authenticity of the goods has been duly proved by the seller.

vi. Repeat offending sellers: Where a right owner notifies an online service provider of a web user who repeatedly commits online illicit practices, the online service provider should remove and block all posts by that web user (including any that use pseudonyms) that contain the relevant trade mark.

vii. IPR Policies: Online service providers should adopt and enforce transparent and comprehensive policies aiming at protecting right owners’ legitimate rights (e.g., IP rights or selective distribution networks), which should be clearly indicated on their sites and reflected in the contracts which they agree upon with their users.

This list is not exhaustive and other preventive measures should be considered such as the origin of the products or the price of the products.

Also, general information, including information acquired from Notice and Take-down (“NTD”), should also be used by online service providers to improve both proactive and preventive measures.

To encourage consumer recognition of and confidence in websites (or other online services) that take preventive and proactive measures to stop and prevent online illicit practices, those websites could be permitted to display a trust mark. Conversely, display of that trust mark by an online service provider that does not take any preventive and proactive measures in practice should be actionable (including as a breach of
the Unfair Commercial Practices Directive for consumer-facing websites). In that respect, LVMH welcomes the European Parliament’s idea of a new “trust mark” to give consumers peace of mind when shopping online.40 This would ensure greater transparency and consumer trust.

2. Duty to promptly remove or disable access to illicit acts or content, upon obtaining knowledge or awareness of such illicit acts or content

In the event the proactive and preventive measures could not prevent online illicit practices, online service providers should promptly remove or disable access to illicit content, upon obtaining knowledge or awareness of such illicit content. In some instances, online service providers should be deemed to have knowledge or to be aware of an illicit act or material without the need for a Notice and Take-Down procedure (e.g., when it was obvious to a reasonable person in the circumstances, when the online service provider already received relevant information from other recipients of the service or any other third party, or on the basis of previous notifications).41 In other instances, NTD procedures are indispensable measures in the fight against online illicit practices.

The ECD lacks a Notice and Take-Down procedure like the one set forth in the United States in their Digital Millennium Copyright Act (“DMCA”) for example. The preferred option at the time the ECD was enacted was to encourage the adoption of voluntary agreements and codes of conduct between business operators or statutory regulation at national level, rather than a harmonized European approach.42

This approach of favouring voluntary agreements between stakeholders has produced uneven results. It appears that agreements have been reached in some countries between online service providers and right holders.43 At the same time, European level approaches to resolve this issue among stakeholders have proven elusive so far.

A small number of countries have enacted legislation implementing a notification procedure. In France, for instance, the statute implementing the ECD provides a statutory procedure for notification of illicit content.44 This lack of harmonisation across Europe however reduces the ability for national courts and authorities

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40 Report on completing the internal market for e-commerce (2010/2012(INI))
41 For instance, German courts have ruled that where the goods put for sale on an online auction site are described as “counterfeit”, where the infringer has been involved in a prior infringement or where the goods can be identified as illegal such as banned CDs and computer games that can be identified by their titles, the operator has actual knowledge without a NTD being required.
42 Article 14 ECD states that Member States have the possibility to establish procedures for the removal of illicit information. Recital 40 ECD states that the provisions of the ECD form “the appropriate basis for the development of rapid and reliable procedures for removing or disabling access to illegal information”.
43 See in France the Charter signed under the auspices of the Ministry of the Economy
44 Loi n°2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique, Article 6
to resolve disputes quickly so they will continue to be referred to the ECJ. This leads to slow decision-making that will hinder legal certainty in the fast-moving online market. We believe the European Commission should consider recommending harmonised NTD procedures, which would undoubtedly help to further legal certainty and, ultimately, consumer trust.45

**What LVMH proposes**

LVMH respectfully proposes that the European Commission should take a lead position and implement harmonised NTD procedures that would apply to all online services providers, including “basic” online service providers that benefit from the liability exemption regime.46

A harmonised NTD regime should be based on the spirit of cooperation and trust between online service providers and right owners to the benefit of consumers and could be drawn along the following lines:

i. Online service providers would be requested to offer efficient and effective NTD procedures, which should be easily accessible through electronic means. They should be easy to locate on the relevant website, easily understandable and not excessively burdensome or complex to subscribe to, complete or process.

ii. The European Commission could issue a European NTD template setting out the information required in all Member States from the notifying party, such as:
   - clear identification of the notifying party,
   - the date of the notification,
   - its recipient,
   - the location and, if needed, a short description of the infringing act or material,
   - a brief explanation of why the activity is infringing (e.g., sale of counterfeit goods or sale of goods in violation of selective distribution networks).47

Right owners should have the possibility of notifying online service providers with multiple infringements of the same web user (e.g., multiple offers of sale by the same seller on an online auction website).

iii. Online service providers should treat notifications in an efficient and comprehensive manner, without undue delay and to ensure that valid notifications of illicit act or material lead to a swift removal or disabling of the notified acts or material (take-down).

45 While not imposing a notice and take-down procedure was deemed to be the best approach at the initial stage, the ECD did expressly envision the possibility of a future amendment introducing a procedure of this kind in Article 21.2 ECD.

46 See above, Section III.A.1. It should be kept in mind that “basic” online service providers within the meaning of the ECD are under no general obligation to monitor the information they transmit or store nor a general obligation to actively seek facts or circumstances indicating illegal activities. The European Commission could therefore propose harmonized NTD procedures that are strengthened for hosting service providers within the meaning of the ECD to protect the “safe harbor” legitimately recognized by the ECD, compared to softer and less burdensome harmonized NTD procedures for other online service providers which are under a duty to act as careful and diligent operators to prevent online illicit practices.

47 In that respect it should be noted that the NTD procedures that might exist in practice generally refer to violation of IP rights. However, it should be noted that the infringement can also come from other illicit practices such as the violation of selective distribution networks. This infringement is not per se a violation of IP rights but is however illicit. Right owners are therefore obliged to use NTD procedures that are ill-fitted to report this type of infringement.
and deterrent measures regarding the sellers involved. Online service providers should also take all the necessary steps to prevent the upload of such illicit acts or material in the future.48

iv. In all cases, online service providers should assess the completeness and validity of a notification. In cases of doubt, or where the online service provider does not have the information required to permit the identification of the allegedly illicit act or material, online service providers could request additional information from the notifying party. Such requests should be made in good faith and should not lead to an unreasonable or undue delay in taking down notified acts or material in response to valid notifications where the online service provider can identify the specific act or material at issue.

Equally, right owners should use NTD in good faith. They should avoid unjustified, unfounded or abusive notifications. In cases where it is proven that notifications are made in bad faith, right owners would be denied or would have only restricted access to a NTD system. Right owners and online service providers would cooperate to minimise potential consequences to sellers in cases of erroneous notifications.

Online service providers and right owners should also commit to provide each other with feedback on their notifications. Relevant sellers should also be informed where infringing material has been taken down, including the underlying reason, and should be provided with the means to respond.

3. Proposal for guidance regarding disclosure and sharing of information and fight against recidivism

It is extremely difficult for right owners to access information and contact details of an alleged or confirmed online infringer. Right owners very often face strong opposition from online service providers who refuse to disclose or share such information. In some EU Member States, authorisation by a designated State agency or court may be required under national law for disclosure of personal data. The process of obtaining such authorisation is too long and does not allow for swift and efficient procedures.

This is a significant issue in practice because to have illicit content removed it is often much more efficient to be in direct contact with the infringers rather than act through NTD procedures with the online service provider.

48 For instance, German and French courts have ruled that that once the content has been notified as illegal and, therefore duly removed by the hosting service provider, it is under the obligation to prevent new upload of the same illegal content, should the new upload be made by another web user. Such approach, which is not inconsistent with the non-monitoring obligations of hosting service providers, is based on the fact that the illicit content and the violated intellectual property rights are the same. See Case IZR 304/01, 11 March 2004; case IZR 35/04, 19 April 2007 and case IZR 73/05, 30 April 2008, Rolex; See also Paris Court of Appeals, 9 April 2010, Flach Film / Google; Paris First Instance Court, 10 April 2009, Zadig Productions / DailyMotion.
III. The main barrier: lack of clear responsibilities along the digital value chain hurts consumer trust in e-commerce

**What LVMH proposes**

The Commission should take the opportunity to implement clear guidance as to how information can be shared between legitimate stakeholders in the spirit of cooperation in order to efficiently prevent online illicit practices along the following lines:

i. To facilitate legal actions and investigations into alleged online illicit practices, online service providers should disclose expeditiously, upon request, relevant information including the identify and contact details of alleged infringers and their user names insofar as permitted by the applicable national data protection laws. Such requests should be made in good faith by right owners.

ii. Online service providers and right owners should cooperate in the detection of repeat infringers.

iii. Online service providers should have in place, and enforce, scalable, transparent and deterring sanction schemes, applicable to repeat infringers, according to their internal guidelines. These schemes should be enforced objectively and include the suspension (temporary or permanent) of accounts. Online service providers should further commit to use their best efforts to prevent re-registration of permanently suspended users. These schemes should take into particular account factors such as the severity of a violation, the number of alleged infringements, the apparent intent of the alleged infringer and the record of notices and feedback received from right owners. Repeat infringers should be barred from being awarded any quality labels by online service providers.

iv. Online service providers should share, upon request, information on sanctions taken against repeat infringers on an individual and case-by-case basis with the right owners concerned.

v. Right owners should be required to inform online service providers about who they believe to be repeat infringers and commit to provide feedback to online service providers on the effectiveness of their schemes regarding repeat infringers.

vi. Online service providers should share information on repeat offenders with each other as well as right owners with a view to creating a watch list of material infringers that is factored into the proactive and preventive measures to be put in place.
C. LVMH PROPOSAL IS SUPPORTED BY COURTS AT THE EU AND NATIONAL LEVELS

LVMH’s proposals are not theoretical ones but in fact correspond to the approach which has been followed by several courts in different Member States to differentiate “genuine” hosting providers from all sorts of online service providers. Even though diverging case-law exists, LVMH believes that the European Commission could validly use the precedents described below to clarify with which services and under which circumstances an online service provider goes beyond the mere storage and transmission of data:

Online auction sites

The Paris Court of Appeals recently confirmed on 3 September 2010 that eBay is an online broker which actively participates in the selling process of the goods displayed on its websites.

The court found that eBay actively seeks to increase the number of transactions achieved by its sites in order to generate commissions. The court specifically referred to several technical and practical examples which demonstrate eBay’s active role in the selling process (advice service to buyers and sellers to enhance the efficiency of their ads, continued assistance to the sellers in connection with their ads and selling operations) to conclude that, even if eBay does host material provided by its users, such activity is a pure preliminary technical step necessary for distance sales of goods via electronic communications: “it has no other purpose” but to serve the main activity of eBay which acts as an online broker. By denying the applicability of the hosting safe harbour to eBay, eBay’s liability – like any other merchant’s liability – must be analysed under the underlying law governing civil and criminal liability. eBay as an online broker, has a duty of care to ensure that its business does not generate illicit activities. The French court found that eBay breached this duty of care by failing to ensure that no illicit counterfeit goods were sold on its website.49

Another court – the Reims Court of Appeals – had followed the same path on 20 July 2010 finding that eBay exceeds the passive role of hosting third-party data when it “uses and modifies” the data stored so as to increase the chances that the sale be completed between the buyer and the seller. The court made an in-depth analysis of the marketing tools used by eBay and came to the conclusion that eBay was actively promoting sales which went beyond its mere activity of hosting third-party contents and aimed at generating commissions.50

49 The Paris Court of Appeals recognised that “the hosting of advertisements placed by users is the preliminary technical means necessary for the remote electronic sales activity, [...] it has no other purpose” and that “[the intermediary’s activity] can therefore not be artificially broken down into a hosting activity and a brokerage activity; [...] account must be taken of the entire operation they propose to users by hosting their advertisements on their website, in order to qualify the service legally”; Paris Court of Appeals, 3 September 2010, eBay Inc International / Christian Dior Couture, eBay Inc International / Louis Vuitton Malletier and eBay / Parfums Christian Dior, Kenzo Parfums, Parfums Givenchy, Guerlain.

50 Reims Court of Appeals, 20 July 2010, eBay France and International / Hermès International, Cindy F
III. The main barrier: lack of clear responsibilities along the digital value chain hurts consumer trust in e-commerce

**Paid referencing systems / Search engines**

On the basis of the case-law information available in Europe as of the end of 2007, the Liability Report commissioned by the European Commission already indicated that:

“[i]t is hard to conceive of liability exemptions in a system that is designed to generate revenues for the search engine operator and which is, in principle, controlled by the search engine operator. As far as these systems are concerned, the reason for exempting providers from liability is not applicable, as providers do not act as mere technical intermediaries.”

In addition, in its 23 March 2010 Google ruling, the European Court of Justice (ECJ) gave some useful guidelines to determine what elements define whether a paid referencing system could qualify or not as a hosting provider. The ECJ pointed out that “with the help of software which it has developed, Google processes the data entered by advertisers and the resulting display of the ads is made under conditions which Google controls. Thus, Google determines the order of display according to, inter alia, the remuneration paid by the advertisers”. It is also expressly specified that “the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant”.

National courts in similar cases also had the opportunity to rule that Google played an active role via the AdWords system and should therefore not be regarded as a mere hosting provider of third-party content. On 6 December 2007, the Aix-en-Provence Court of Appeals found that Google, proposing services that help in choosing keywords that would make the sponsored link more attractive, exceeded its role of storing third-party content and should be qualified as a publisher falling outside of the “safe harbour” regime.

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51 Study of the liability of internet intermediaries, November 2007, p. 20
52 These cases are different from the French Google cases which led to the ECJ ruling of 23 March 2010, Google France, Google, Inc. v Louis Vuitton Malletier, Viaticum SA, Lutece SARL, CNRRI, Pierre Alexis Thonet, Bruno Raboin, Tiger SARL. It should be borne in mind that these cases are still pending before the Paris Court of Appeals after the French Supreme Court decision on 13 July 2010 to refer the case to the Paris Court of Appeals. However, we believe that the criteria used by for instance the Aix-en-Provence Court of Appeals remain valid and could be used again by the Paris Court of Appeals.
53 Aix-en-Provence Court of Appeals, 6 December 2007, TWD Industrie / Google France, Google Inc.
User-generated content

In a case involving a video-sharing website (YouTube), the District Court of Hamburg in Germany recently ruled on 3 September 2010 that YouTube could not benefit from the “safe harbour” regime provided under Article 14 ECD. The court held that YouTube was not a neutral platform as it did not exclusively store or transfer data for third parties. The court based its assessment on an extensive and detailed analysis of YouTube’s internet presence (including layout, use of logos, Terms and Conditions, search function, advertisements) to conclude that, in the opinion of an objective fictitious third-party – to which German courts are used to referring to assess operators behaviour and liability – YouTube actively appropriated the content posted by web users and was acting as if it wanted to bear responsibility for the said content.

In another example, on 29 March 2010, the High Court of England and Wales refused to apply the “safe harbour” regime to the defendant, a blogger for the content of his blog, even for parts posted by third parties. The court assessed that the defendant’s involvement in the pages went beyond mere storage (the defendant admitted that he actively made corrections to third-party content posted and altered the content when necessary) so that the hosting immunity would not be available in respect of liability for illicit content (for instance, defamatory words) appearing on the pages.

Content aggregators

In the Tiscali case, Tiscali offered a service that allowed users to create personal pages and have them posted on Tiscali. One user had created a webpage and uploaded plaintiff’s copyrighted comic books to it. The French Supreme Court found that Tiscali had not limited itself to providing hosting services, but rather went beyond that function by actively proposing to web users that they create their own personal pages through its website. In particular, the court reasoned that Tiscali had to be deemed a publisher because it encouraged advertisers to insert advertisements directly on users’ personal pages. Consequently, the court found that Tiscali fell outside the “safe harbour” provisions and was liable for the copyright infringement that occurred. The court found Tiscali to be a publisher and not a mere hosting provider because Tiscali had commercially exploited the hosted web pages through advertisements.

54 The High Court of England & Wales, 29 March 2010, Kaschke and Gray Hilton.
55 French Supreme Court, 14 January 2010, Tiscali Media / Dargaud Lombard. It should be noted that the facts of the case happened before the implementation of the ECD in the French legislation. However, previous French rules already provided for an exemption liability regime which was similar, mutatis mutandis, to the “safe harbour” provisions of the ECD. Therefore, we deem the Tiscali case to be relevant in the context of the ECD.
In a case involving a content aggregator displaying on its website www.entrevue-web.fr links posted by third parties, the Paris Court of First Instance refused on 8 June 2009 to recognise the website as a hosting provider since the owner and website played an active role deciding how the links should be classified, giving personalised advice on how the links should be presented to be more attractive and making them available to any web user consulting the website. Doing so, the content aggregator was deemed to be the publisher of the links and therefore held liable for the content of the links.567

Online auctions of domain names and parking pages services
French courts (including the French Supreme Court in a decision dated 21 October 2008 57) found that Sedo – a German-based online auctioneer of domain names and “parking” pages - could not benefit from the “safe harbour” defence since it was playing an active role going beyond the mere hosting of third-party domain names. Regarding the offer to put on sale domain names owned by third parties via an online auction system (domain names which reproduce trademarks owned by third parties) the courts pointed out that Sedo offers several marketing tools to “optimise the chances to sell the domain name”. It was therefore considered that Sedo was acting as an online broker, deeply involved in the transaction process with the aim of multiplying sales in order to increase its commissions. In regard to the monetised domain name parking activity, Sedo was deemed to be a publisher and not a hosting provider as it proactively suggested the sponsored links to be placed on the parking page.

We believe the approach followed by the non-exhaustive case-law described above in France, the UK and Germany as well as by the ECJ would constitute the right application of the “safe

56 Paris Court of First Instance, EH / Société de conception de presse et d’édition, 8 June 2009.
57 French Supreme Court, 20 October 2008, Sedo / Hotels Meridien; Paris Court of Appeals, 23 September 2009, Sedo / INPI; Paris first instance Court, 12 March 2010, Dreamex / Sedo GmbH.
D. A MORE COMPREHENSIVE APPROACH TO E-COMMERCE

LVMH further believes that the question of e-commerce is not only addressed by the ECD. There are a number of other policy instruments that, directly or indirectly, have an impact on the ECD and therefore on e-commerce. LVMH respectfully submits that the European Commission could also have a more comprehensive approach and use these policy instruments to positively influence e-commerce in Europe.

Unfair Commercial Practices Directive (“UCPD”)

The UCPD is one of these policy instruments. Paragraphs 9 and 13 of Annex 1 of the UCPD state that:

“9. Stating or otherwise creating the impression that a product can legally be sold when it cannot”;

and

“13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not”,

are commercial practices that shall in all circumstances be regarded as unfair (Article 5(5) UCPD). Moreover, “Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provision of the Directive in the interest of consumers” (Article 11(1) UCPD).

LVMH believes that the Commission should take the opportunity of this consultation on e-commerce to clarify that the UCPD also applies to online service providers to the extent that they advertise the sale of products on their own or third-party websites in circumstances where those advertisements relate, or are likely to relate, to products that cannot legally be sold (or where those advertisements would otherwise be unfair). LVMH further believes that the “hosting” defence in the ECD is not relevant to these activities because they involve active advertisements that are initiated by an online service provider (e.g., advertisements for branded products through the acquisition of keywords), which clearly goes beyond the mere storage of data.

Intellectual Property Rights Enforcement Directive (“IPRED”)

Given the upcoming likely revision of the IPRED directive, we believe the EC should examine whether this would not be another opportunity for the Commission to clarify the roles played by online service providers in the digital value chain and to further build on the relationship between IPRED and the ECD. In particular, LVMH believes that specific forms of injunctive relief should be available against online service providers in all Member States, for example an injunction requiring an online service provider to implement specific types of filtering.

Trademark Protection Online

A critical source of concern is the purchase of keywords and sponsored links identical or similar to a trademark in online advertising without the consent of the trademark’s owner. Currently this is not covered by trademark law, principally because the legislation on this matter was passed before the issues around online advertising arose. It is of paramount importance to ensure that the trademark system is properly adapted to the challenges of this digital era so that trademarks enjoy the same level of protection online as they do offline.

Substantive trademark law, and other IP laws, should develop new tools to define trademark infringement on the internet based on the same principles of trademark protection offline. EU trademark law is mainly tailored to offline market commerce, and struggles with addressing new uses of trademark as well as uses of trademark on the internet (e.g., Article 5.3 of the Trademark Directive). The traditional one-on-one infringement setting in offline market trademark law is increasingly challenged on the internet, where there may be one or millions of traditional infringers, but also intermediaries, who regardless of intent, facilitate direct infringement of trademark rights.

The European Commission has recently taken a first step towards a revision of the European trademark system. To that end, the Commission has commissioned a study and has, inter alia, expressed interest in understanding (i) whether the definition of the rights conferred on trademark owners still satisfies current needs (Article 5 of the Trademark Directive and Article 9 of the Community Trademark Regulation), and (ii) whether there is a need to clarify the difference between well-known trademarks and those with a reputation.

LVMH believes Article 5(3) of the Trademark Directive and Article 9(2) of the Community Trademark Regulation could be amended to better reflect how trademarks are used on the internet.

1. There should be no need to demonstrate that there is “trademark use” in certain internet contexts (Articles 5 and 9);  
2. The quality guarantee function must be taken into account when assessing whether a trademark owner can oppose a third party’s use of a sign, and to that end the prestigious image of certain trademarks constitutes quality;  
3. The mere proximity to a trademark with a reputation / image of certain third-party products is itself liable to amount to unfair advantage or to cause detriment.