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LEGAL AND CORPORATE STRATEGIES OF LUXURY GROUPS AND COMPANIES: A COMPARATIVE STUDY BETWEEN FRANCE, THE UNITED-KINGDOM AND THE UNITES STATES

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SUMMARY

The luxury industry is a key sector and is regularly subject to litigations in various matters. Beyond this legal aspect, luxury, and more specifically luxury fashion, constitutes a well-established and influential market on a global scale. It is indeed present in most countries around the world and is constantly expanding. Consequently, given its economic power and the potential legal disputes it can generate in many jurisdictions, studying luxury from a legal perspective appears particularly appealing.

First of all, the stability and success of luxury businesses primarily depend on their legal form. However, France, the United-Kingdom and the United-States offer a wide range of business entity types, sometimes ill-suited to the luxury sector. As a result, Haute Couture houses must carefully adapt and ensure to be well informed about the legal characteristics of their structure. Moreover, the emergence of modern corporate forms in these three jurisdictions, particularly in the United-States, might disrupt existing legal framework. Jurisdictions may thereby have to reform their company law in order to maintain their control over the area.

Moving on, the luxury industry is a very competitive sector in which Haute couture houses may have to use legal tools to remain attractive and exclusive. Consequently, these companies generally form or join luxury groups, structures that are usually underregulated. This lack of regulation tends to benefit luxury companies, allowing them to take advantage of it in many areas such as taxation. This holds true for France, the United-Kingdom and the United-States.

Finally, this constant need to expand and remain attractive often constrains companies to pursue mergers and acquisitions. While these strategies are commonly used in the luxury industry, companies regularly face legal obstacles when launching them. Thus, France, the United-Kingdom and the United-States have implemented measures to regulate and even limit them. Furthermore, mergers and acquisitions sometimes appear to be hostile, harming small but successful luxury companies that may struggle to defend themselves, even with the use of legal resources.

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INTRODUCTION

"I used my taste for what shines to try to reconcile, through adornment, elegance and fashion." Gabrielle Chanel

This quote from *Gabrielle Chanel,* even if specific to the luxury sector, applies to the legal world since it highlights the possibility of using the legal tools at our disposal to create or escape from a specific situation.

§ 1 – Luxury and fashion's stake. Luxury goods are not only products but also a way of thinking and consummating. They are more than simple bag or clothes; it is a way of influence and contribution to many countries' economy. "The heart of the fashion system remains embodied by French brands with an international dimension. The members of the Fédération de la Couture, du Prêt-à-Porter, des Couturiers et des Créateurs de mode, who generate 88% of their turnover internationally, constitute a significant group to which should be added other brands from the worlds of clothing, perfume, accessories, etc."[1] The Fashion and Luxury business is also well developed in the United-Kingdom and the United States of America where it also represents a large stake of the two countries' economy. It is therefore really interesting to analyse how this industry works and how the law applies to it.

§ 2 – Fashion and luxury companies. The main actors of this luxury sector are the fashion and luxury companies. They all indeed contribute to the expansion of the luxury industry and operate differently depending on their jurisdiction. I therefore decided to focus my researches on luxury companies across three jurisdictions: France, the United-Kingdom and the United States of America. It is important to note that, within this paper, references to the United Kingdom primarily concern the jurisdictions of England, Wales, and Northern Ireland, as Scotland operates under a distinct legal system.

- **Section 1: The definition of Luxury**

§ 3 – No legal definition. Despite the expanding power of the luxury industry in the three jurisdictions, lawmakers did not intent to draft any actual legal frame for the *"Legal and*

[1] FEDERATION FRANÇAISE DE LA COUTURE, du Prêt-à-porter des Couturiers et des Créateurs de Mode, *Les industries de la mode dans l'économie française,* p.3

corporate strategies of luxury groups and companies". This industry is usually mainly regulated by ordinary corporate laws. This legal vacuum is however sometimes completed by the courts who rule on subjects that necessitate a specific framework. This lack of precise body of laws is also balanced by some institutional authorities as the FTC[2] in the United States or "l'autorité de la concurrence"[3] in France. As well as the *"Legal and corporate strategies of luxury groups and companies"*, the term luxury has never been defined by neither of the three jurisdiction's law makers. This lack of ruling might be linked to the fact that the term luxury is not in itself a legal term. However, transactions or operations related to the luxury industry would sometimes need to be regulated by an actual specific legal framework (e.g mergers and acquisitions).

§ 4 – A broad, non-official definition. Despite the fact that no actual legal signification has ever been drafted across the three jurisdictions, many authors intended to give their own definition of the *"Legal and corporate strategies of luxury groups and companies"*. For instance, in her book[4], Dana Thomas emphasised that this topic includes many areas of law. She focuses on corporate structures/entities and legal frameworks surrounding luxury goods. Then, the term luxury has also been subject to a lot of individual definitions but it appears important to specify that this analysis will focus on the fashion/lifestyle side of the entire luxury field. This limitation is needed to ensure a precise work and avoid being too generic.

§ 5 – The notion of *Luxury*. The notion of "luxury" tends to be a broad term and includes plenty of different concepts/areas of business. The French *General Business Directorate*[5] defines it as being characterised by a "diversity of actors and professions spread across the territory"[6]. It also recalled that the sector of luxury is mainly organised into groups (LVMH, Kering, Hermès…) that are sometimes still family-owned.

Moving on, it is important to mention that luxury is a discrete term and that its signification differs depending on who interprets it. As a result, discretion is key and this is what makes its

[2] FTC for *Federal Trade Commission*: "Protecting America's Consumers"
[3] French competition authority (Autorité de la concurrence)
[4] THOMAS Dana (American journalist), *Deluxe: How Luxury Lost Its Luster* (Penguin Publishing Group, 2007)
[5] For « Direction générale des entreprises » in French
[6] Direction générale des entreprises , *La filière mode et luxe*, 2024, URL: https://www.entreprises.gouv.fr/secteurs-dactivite/industrie/les-comites-strategiques-de-filiere/la-filiere-mode-et-luxe

analysis even more complicated: no one actually agrees on what luxury exactly is. According to Merriam-Webster, luxury relates to:

"(1) a condition of abundance or great ease and comfort: sumptuous environment;

(2) (a) something adding to pleasure or comfort but not absolutely necessary"[7]

She also emphasises that luxury is not automatically related to expensive goods or services. What is a luxury for me will not mandatorily be a luxury for someone else. Therefore, few elements help defining this notion: the quality, the exclusivity and the brand values or heritage.[8] "Luxury comes from Latin word "luxus" which means excess, magnificence, and splendor."[9]

Given this, it might be worth it emphasising that, yes, luxury is not automatically related to the price of the good. However, for the sake of our analysis, it is interesting to take into account products' expensiveness. Indeed, our researches do not focus on a psychological analysis (very discrete) of the luxury but on a legal one. It is therefore important to rely on universal reliable concepts. Finally, the perception of luxury is unlikely to differ significantly between France, the United Kingdom, and the United States.

§ 6 – The notion of Luxury Fashion. Luxury fashion is a more precise notion comprised in the luxury concept. Indeed, while it includes plenty types of businesses, our analysis will focus on fashion/lifestyle luxury. It is therefore important to recall what fashion exactly is.

Fashion "refers to a set of trends and styles that characterise a specific historical and cultural period"[10]. Then, as *Luxury fashion* might be a little too specific for some topics, *fashion* in general will be mentioned instead. These notions are moreover mainly regulated by a set of rules called "fashion law" which is defined as "the body of law and legal principles that governs the relationships among the various participants in the fashion industry, the relationships between such participants and the consumer".[11] While fashion law is broadly used across the three jurisdictions, our analysis will be more at the intersection of Fashion law and company law in general.

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[7] WEBSTER Merriam, *A Study of Luxury Companies*, Recurve Capital, 2025, URL: https://recurvecap.com/insights/a-study-of-luxury-companies

[8] *Ibidem*

[9] 99th INTERNATIONAL SCIENTIFIC CONFERENCE ON ECONOMIC AND SOCIAL DEVELOPMENT, *Sustainability*: *the ultimate luxury*, 2023, p2

[10] ROME BUSINESS SCHOOL, *What is Fashion? Definition, Meaning, and Evolution,* URL: https://romebusinessschool.com/blog/what-is-fashion/

[11] HOGAN Howard S. and MAGUIRE J. Bellah, *Fashion Law and Business: Brands & Retailers* (Practising Law Institute 2019), Introduction

§ 7 – Luxury groups and companies. Luxury fashion companies deal with many areas of fashion/lifestyle such as cosmetic and perfume, clothing, leather goods, jewellery and shoes. Thus, "a luxury brand represents specific social and cultural meanings conveyed by the product or brand that are used by consumers."[12] Therefore, the goods/services offered by the company determine its status.

As a result, in order to qualify as luxury corporations, the companies need to propose luxurious services/goods. However, no one can self-proclaim being a luxury company. This status also depends on the consumer's opinions. Therefore, according to BECKER, three main criteria must be taken into account when determining if a company can qualify as a luxury entity: "(1) the product category, (2) the degree of luxury and exclusivity associated with the brand, and (3) the context of use"[13]. However, meeting those criteria will not automatically make the entity a luxury company. Indeed, qualifying as it might be a bit more complicated since the entity has to be recognised as it by a bunch of high ranked public figures (e.g., Anna Wintour). Moreover, these criteria are sensibly the same across France, the United-Kingdom and the United States of America.

§ 8 – Examples of Luxury fashion companies. Many fashion companies can qualify as Luxury fashion companies across the three jurisdictions. They shall meet the requirements stated above and are mainly owed by few families since their creation. Those companies are for instance Hermès and Chanel in France, Burberry in the United-Kingdom or Ralph Lauren and Tommy Hilfiger in the United-States. Let's take the example of Hermès and try to address what exactly makes this company a luxury corporation.

Founded by Thierry Hermès in 1837, this company never ceased to influence the world and be identified, in the consumer's eye, as a luxury brand. Indeed, after starting the business with horse-riding accessories, the company then extended its collection to luxury clothes, perfumes, watches, leather goods… Additionally, this family-owned brand maintained a high degree of exclusivity by restraining its goods offer, making almost impossible for a regular consumer to purchase its products (e.g., the Birkin Bag released in 1984). Hermès is also famously known

[12] BECKER, K., LEE, J. W. and NOBRE, H. M, *"The Concept of Luxury Brands and the Relationship between Consumer and Luxury Brands"*, Journal of Asian Finance, Economics and Business Vol 5 No 3 (2018), p.51
[13] BECKER, K., LEE, J. W. and NOBRE, H. M, *"The Concept of Luxury Brands and the Relationship between Consumer and Luxury Brands"* (n12), p.53

for its products' high quality and expensiveness since "one of Hermès' core principles is that each bag be made by the same artisan, from start to finish"[14]. Finally, the family-owned brand seasonally presents its collections during the "fashion weeks", events attended by multiple fashion public figures. As a result, Hermès perfectly qualifies as a luxury company. This is also the case of Burberry in the United Kingdom or Ralph Lauren in the United States. Both of them were created a while ago and always knew how to evolve in order to meet potential clients' needs throughout the years.

- **Section 2: The evolution of Luxury fashion over the years**

§ 9 – The notions of fashion and luxury fashion. The notion of Luxury fashion "has evolved to be considerably more diverse, complex, and global"[15]. Indeed, while Luxury fashion remains highly exclusive, the increasing power of the internet softened this aspect and made luxury a bit more accessible. However, it remains primarily reserved to a certain part of the society and consumers.

Moving on, the luxury fashion companies were first born in France "where Parisian suppliers provided special fabrics and trim to customers seeking the most "fashionable" apparel".[16] In the meantime, several luxury brands developed overseas, in England, such as House of Worth established by the designer Charles Frederick Worth (1825–1895). Years after, "the growing women's magazine industry brought images of the latest European styles, along with printed patterns, to American women"[17]. This is the beginning of a luxury industry in the United-States of America. Then, while the evolution of fashion houses has been stopped during Word War II, they re-emerged as powerful luxury brands after a couple of years. The main luxury companies' growth "accelerated meaningfully" throughout the last decade reaching its highest level ever.[18] This progression is either observable in France, in the United-Kingdom or in the United States of America since those companies mainly develop across these three jurisdictions.

[14] CHABOUD Isabelle, *Hermès: behind the scenes of the French luxury gem*, The conversation, 2017, URL: https://theconversation.com/hermes-behind-the-scenes-of-the-french-luxury-gem-80551
[15] HOGAN Howard S. and MAGUIRE J. Bellah, *Fashion Law and Business: Brands & Retailers* (n11), Introduction
[16] *Ibidem*
[17] *Ibid.*
[18] WEBSTER Merriam, *A Study of Luxury Companies* (n7)

§ 10 – The evolution of fashion law in France, the United-Kingdom and the United States of America. While "fashion law" gained in importance these past few years within the three jurisdictions, no specific legal framework has been established to specifically regulate the business of the luxury groups and companies. In France and in the United States, while some non-official rules have been drafted, lawmakers never really intended to regulate the luxury companies' business.

In France first, "*the Chambre Syndicale de la Haute Couture*[19], established in 1868, imposed stringent membership rules limiting the number of haute couture houses that could operate in Paris and thereby reinforced the quality, exclusivity, and high prices of haute couture".[20] Then, the "Fashion Law Institute" has been created in the United States of America with the support of the "Council of Fashion Designers of America". Their aim is to cover and solve legal issues related to Luxury fashion within the country.

- **Section 3: The choice of France, the United-Kingdom and the United-States**

§ 11 – Legal and corporate strategies of luxury groups and companies. Nowadays, the luxury sector is one of the most powerful ones and will continue to be so[21]. However, luxury companies can reinforce their power and enhance their competitiveness by using a well-designed and executed legal strategy.[22] This legal strategy is based on a good understanding of corporations' forms but also by a well-thought development strategy. It is indeed crucial for a luxury company to be well informed on what is necessary to become more attractive. However, the lack of regulation in the field makes the analysis of the legal and corporate strategies of luxury groups and companies more difficult than in other business sectors. It is therefore interesting to analyse it more in depth since the lack of actual legal frame sometimes offers luxury companies greater flexibility to innovate and tailor their corporate strategies uniquely.

§ 12 – The French, English and American jurisdictions. These three jurisdictions welcome numerous international famous Luxury fashion companies. France is the first country we think of when it comes to luxury. "In particular, French designer Christian Dior (1905–1957) helped

[19] French for "Chamber of Haute Couture"
[20] HOGAN Howard S. and MAGUIRE J. Bellah, *Fashion Law and Business: Brands & Retailers* (n11)
[21] WEBSTER Merriam, *A Study of Luxury Companies* (n7)
[22] CARCANO Luana, *Strategic Management and Sustainability in Luxury Companies: The IWC Case*, The Journal of Corporate Citizenship (Greenleaf Publishing), December 2013, No. 52 (December 2013), p.1

to reestablish Paris as an international fashion capital."[23] Thus, France has successfully maintained its leading position in the global luxury market in 2024[24] and owns the 10 top global luxury goods companies. They therefore remain essential to the French economy.

Then, the United-Kingdom (UK) is also known for its ability to trade globally and develop lots of Luxury fashion brands such as Jimmy Choo or Burberry. Department stores were also largely developed in the United-Kingdom within the ninetieth century. They consequently contributed to the rise of an English made luxury. This development then led to the creation of plenty companies such as Vivienne Westwood for instance. Nowadays, British Luxury fashion companies have a real impact on global fashion and therefore deserve a deeper analysis.

Lastly, the United-States is one of the leading countries in term of luxury goods consumption. It is in the 1920s that the luxury market was established in the United-States of America and has increasingly developed since then. New York City is indeed one of the most famous cities in the world in terms of luxury fashion. Moreover, lots of luxury companies are now owned by several American groups.

As a result, since France, the United-Kingdom and the United-States share similarities in the luxury fashion industry, it is worthwhile to analyse how these three jurisdictions regulate this powerful sector.

How do the legal and corporate strategies of luxury groups and companies differ or converge between France, the United Kingdom and the United States?

First of all, it is necessary to remember that the core of the legal and corporate strategies employed by luxury companies and groups lies in choosing an appropriate legal structure (Title 1). Next, it is necessary to examine how these entities ensure the protection and enhancement of their identity and attractiveness (Title 2). Finally, analysing their approach to mergers and acquisitions is essential to fully understand how luxury businesses operate on both national and international scales (Title 3).

[23] HOGAN Howard S. and MAGUIRE J. Bellah, *Fashion Law and Business: Brands & Retailers* (n11)
[24] HOGAN LOVELLS, *2025 Lexology Panoramic: Luxury & Fashion France* (LexisNexis 2025), p.1

TITLE 1) Legal structuring at the heart of the luxury sector's corporate strategy: France, the United Kingdom and the United States

The legal structuring of luxury and fashion companies is at the heart of their strategy. They can opt for regular and ordinary forms (Chapter 1) but can also use innovative modern company forms (Chapter 2).

CHAPTER 1) The corporate models of luxury entities in France, the United Kingdom and the United States

The choice of corporate form is an important consideration for any company, in France (Section 1), in the United Kingdom (Section 2), and in the United States (Section 3). This is even more true for the luxury industry, which tends to be highly competitive.

- **Section 1: Corporate forms of French Luxury Companies**

In France, various different corporate forms are available (I) but only few are commonly adopted by luxury companies (II).

I) French corporate forms

§ 13 – French Corporate Forms and the Luxury Industry. "Thanks to the luxury industry, some companies have been able to remain in France and also withstand pressure from foreign competitors who are often much cheaper." This statement by J. Matas[25] illustrates that many world-renowned luxury companies are incorporated in France and highlights their significance. However, since the luxury sector has its own unique characteristics, certain French corporate forms are not at all suited to this industry. Indeed, choosing a legal form inevitably has patrimonial, tax, and social consequences. It is therefore crucial to select the form that best fits the nature of the business.

[25] MATAS J., *La filière du luxe, un enjeu pour le développement local* (Vie Publique, Parole d'Expert 2019), URL: https://www.vie-publique.fr/parole-dexpert/271906-la-filiere-du-luxe-un-enjeu-pour-le-developpement-local

§ 14 – French Corporate forms less likely to be used in the luxury industry. Many types of French corporate forms are not suited to the luxury industry. It is therefore useful to mention them without analysing them in detail.

First of all, the "*société à responsabilité limitée*" (SARL), the "*entreprise unipersonnelle à responsabilité limitée*" (EURL) and the "*société par actions simplifiée unipersonnelle*" (SASU) are the corporate forms better suited to small businesses due to their structure and characteristics.

However, as the luxury industry is constantly evolving and expanding, it seems unlikely that a large firms from this sector would choose such structures. In the case of a SASU or EURL, the company may only be formed by a single shareholder. Furthermore, under Article L.223-1 of the French Commercial Code[26], an SARL may have between 1 and 100 shareholders. Generally speaking, these initial limitations clearly hinder the company's potential for further growth. This is particularly problematic in the luxury sector, which is often controlled by large families composed of multiple members. It is indeed difficult to imagine an Haute couture house being run by a single shareholder, given the stakes involved. As for the SARL, although it may have up to 100 shareholders, it cannot, under any circumstances, be publicly listed. This is a further limitation that appears entirely unsuitable for the luxury industry, in which most companies rely on external investors. This restriction can, however, be offset if the company is part of a group, which is a common occurrence in the luxury sector.

However, the luxury industry is an extremely competitive sector in which it is very difficult to break into. It may therefore be beneficial for an emerging designer or entrepreneur to start its business by choosing a SARL, EURL, or SASU. From a financial perspective, these corporate forms are particularly advantageous as they do not require any minimum capital. For example, under Article L.223-2 of the French Commercial Code[27], the minimum share capital for a SARL is determined by its articles of association. However, since a company cannot be formed without any contribution, a symbolic capital of one euro is typically required. This lack of a formal capital requirement allows small luxury businesses to grow and eventually compete with major French luxury brands. Indeed, the luxury industry is a wealthy sector that demands substantial resources to finance the development and production of collections. Therefore, opting for a

[26] Art. L. 223-1 C. com. (Fr)
[27] Art. L. 223-2 C. com. (Fr)

SARL, EURL, or SASU can be a strategic way to challenge the dominance of well-established French luxury groups. Nevertheless, these legal structures come with limitations, and business owners may eventually need to change the corporate form to adapt to their company's growth.

As one expert noted, "while the global luxury market is dominated by a few giants that hold most of the leading brands, the industry itself thrives thanks to a network of small companies that work in collaboration with major houses and, at times, directly at an international level."[28] Thus, although most major French luxury companies would not adopt the SARL, EURL, or SASU forms, many small luxury businesses do make use of them. For instance, Jacquemus, a highly popular luxury brand, initially chose to operate as a SASU before changing its corporate form to become a SAS[29].

§ 15 – French Corporate forms more likely to be used in the Luxury Industry. Three other types of companies are more likely to be adopted by French luxury firms.

First, the *Société Anonyme* (SA), governed by Articles L225-1 *et seq.* of the French Commercial Code[30], allows for the development of a larger-scale business. Indeed, the law does not limit the number of shareholders it may have. However, it must have at least 2 shareholders[31], and 7 if it is listed on the stock exchange.[32] Furthermore, Article L.224-2 of the French Commercial Code[33] states that an SA must have a minimum share capital of €37,000. While this requirement may appear strict, it is important to recall that the luxury industry is a sector in which leading companies generally have far more than €37,000 in share capital. Additionally, SA shares are negotiable and freely transferable. This freedom allows shareholders to transfer their shares without needing the approval of the others. The SA therefore presents several advantages for luxury companies, which, by choosing this form, can fully develop their business both nationally and internationally.

Then, the *Société par actions simplifiée* (SAS), a company form closely related to the *Société Anonyme (SA),* is frequently adopted by French luxury businesses due to its flexibility, particularly the emphasis placed on the company's articles of association. This form is governed

[28] MATAS J., *La filière du luxe, un enjeu pour le développement local* (n25)
[29] According to JACQUEMUS' Website
[30] Art. L. 225-1 et seq C. com. (Fr)
[31] Art. L. 225-1 C. com. (Fr)
[32] Art. L. 22-10-2 C. com. (Fr)
[33] Art. L. 224-2 C. com. (Fr)

by Articles L.227-1 et seq. of the French Commercial Code[34], but in cases where the law is silent, it remains subject to certain provisions applicable to SAs. From a financial standpoint, Article L.227-2 of the Commercial Code[35] states that an SAS may not be listed on the stock exchange. However, this limitation is not necessarily an issue if the company is part of a larger group, a common scenario in the luxury sector. Under Articles L.227-1 et seq., both the minimum share capital and the method for appointing directors are determined by the articles of association. Moreover, Article L.227-14[36] provides that share transfers may be subject to prior approval from the other shareholders, if so provided by the articles. By default, shares are freely transferable. This degree of flexibility is particularly advantageous for luxury companies, which must constantly adapt to the fast-evolving landscape of the industry.

Moreover, the *Société en commandite par actions* (SCA), governed by Articles L.226-1 et seq. of the French Commercial Code[37], is a type of entity that could also be adopted by French Haute couture houses. According to Article L.226-1, an SCA must include one or more general partners (*commandités*) and at least three limited partners (*commanditaires*). The specific feature of this corporate form lies in the fact that general partners are treated as partners in a general partnership (*société en nom collectif*), whereas limited partners are considered shareholders in a public limited company (SA). Furthermore, limited partners are strictly prohibited from participating in the management of the company. This structure offers a major advantage, as it protects the company from malicious external investors. Indeed, only the shares held by limited partners can be listed on the stock exchange, thereby preventing any hostile takeover bids.

Finally, according to article 206 of the general tax code,[38] these three entities are all taxable under the *"impôt sur les sociétés"* which means that the company is first taxed for its benefits. Shareholders are then taxed depending on how much dividends they receive. This method of taxation is well suited to the luxury industry as it is commonly used by many groups under the French "*intégration fiscale*" system (**See infra, §56**). Then, these three companies' shareholders are limitedly liable which is very valuable in the luxury industry where most of the investors are passive investors.

[34] Art. L. 227-1 et seq C. com. (Fr)
[35] Art. L. 227-2 C. com. (Fr)
[36] Art. L. 227-14 C. com. (Fr)
[37] Art. L. 226-1 et seq C. com. (Fr)
[38] Art. 206 CGI (Fr)

II) French corporate forms and the luxury industry

§ 16 – French luxury companies. First of all, many French luxury houses are registered as *Société anonyme (SA).* This is for example the case of *Givenchy*, incorporated in January 1955 and structured as a "SA à conseil d'administration » (Public limited company with a board of directors). Many other luxury companies are registered under the SA legal status such as *Céline* or *Kenzo*. This corporate form therefore appears to be one of the most suitable for the luxury sector.

Then, lots of luxury Houses chose the *"Société par actions simplifiées" (SAS)* status. This is for example the case of *Louis Vuitton Malletier* (part of the *LVMH Group*) or *Yves Saint Laurent* (part of the *Kering Group*). As stated above (**See Supra § 15),** most of these companies are part of a group, which makes sense since SAS's shares cannot be publicly traded. However, some houses deliberately chose the SAS even though they are not part of a broader group. This is, for instance, the case of *Jacquemus* who recently gained significant popularity. This recent success may be a reason why its shares are not publicly traded yet.

Finally, some other luxury Houses opted for the *"Société en commandite par actions"* primarily for its safeness. This is indeed the case of *Hermès* who strategically trades only its "commanditaires'" shares on the stock exchange in order to avoid hostile takeovers. (**See Supra § 15)**

- **Section 2 : Corporate Structures in the British Luxury Sector**

In the United-Kingdom, numerous corporate forms are available (I). However, only few are adopted by luxury companies (II).

I) British corporate forms

§ 17 – British Corporate forms and the luxury industry. Like in France, the United-Kingdom welcomes a lot of luxury fashion companies. It is therefore worth it analysing how these houses structure their business, as choosing one legal status over another carries significant legal consequences.

§ 18 – British Corporate forms less likely to be used in the luxury industry. As in France, some UK corporate legal entities are less likely to be chosen by luxury companies. They are indeed generally not well suited to the business of luxury. In order to understand why is that, it is worth it briefly enumerating these entities.

First of all, the general partnership (Partnership act (1890)[39]) and the limited partnership (Limited partnership act (1907)[40]) are both unlikely to chosen by luxury companies for the same reason as in France: they are better suited to small businesses due to their structure and characteristics. Indeed, their structure and regulation present some limitations that could prevent luxury companies and big companies in general from operating on a broader scale. Thus, while the law governing these two legal statuses remains quite flexible, the general partnership and the limited partnership cannot be listed on a stock exchange. This prohibition is unfortunate within the context of the luxury industry as most of the companies of this sector are publicly traded. Moreover, as general partnerships and limited partnerships do not have legal personality, they cannot own any assets; instead, assets are held in the names of the individual partners. This type of ownership may not be well suited to the luxury industry in which tangible and intangible assets such as trademarks or copyrights, are key. As a result, in case of a legal entity, not being able to manage and hold its personal assets might result in practical and legal issues.

However, starting its business with a General Partnership or a Limited Partnership can be useful, even more within the luxury industry for the same reasons stated above **(See Supra §14)**, regarding French the SARL, EURL and SASU. Indeed, breaking into the luxury sector can be tough for a small business given the competitiveness of the industry. As a result, newcomers could start their activity by opting for a General Partnership or a Limited Partnership, and later change their structure to a more suitable entity. Opting for a Limited Partnership could help luxury companies protect their business from malicious bidders. As in France, only general partners have the right to participate in decision-making. Limited partners, on the other hand, do not take part in this process. As a result, companies often allocate shares to limited partners in order to prevent hostile takeovers. Therefore, while General Partnerships and Limited Partnerships do not appear to be particularly well suited to the luxury industry, they still offer certain advantages.

[39] Partnership Act 1890
[40] Limited Partnerships Act 1907

Finally, the Limited Liability Partnership, governed by the Limited Liability Partnerships Act[41] 2000[42], is generally not favoured by luxury fashion companies, as it does not allow the issuance of shares. Additionally, according to Section 10 of the Limited Liability Partnerships Act 2000, profits are taxed directly at the members' level rather than at the entity level. In other words, the LLP itself is not subject to tax, but members are individually taxed on their share of the profits. Finally, regarding management, an LLP is primarily controlled by its members. With all that said, it appears clear that the Limited Liability Partnership is not well suited to the luxury industry. Indeed, the absence of a formal management structure and the inability to issue shares may hinder a luxury company's growth.

§ 19 – British Corporate forms best suited to the Luxury Industry. Luxury companies are more likely to opt for the private company (Limited/Ltd.) or the public company (Public/PLC) entity. They indeed appear more suitable for the luxury industry. As in France regarding the SCA, SA and SAS, these two entities permit to issue shares and more broadly offer possibilities to expand the business.

First of all, these two company structures, governed by the Companies Act 2006[43], appear to be highly practical, as they can be formed by a single shareholder. Section 7 of the Act[44] expressly permits single-member companies[45], which is particularly valuable in the context of the luxury industry. Indeed, as mentioned above **(See supra §13)**, the sector is not only composed of globally renowned brands but also of small businesses that play a significant role in shaping modern luxury. These two entities are also advantageous, as their shareholders benefit from the limited liability.[46] Regarding Public Limited Companies, these provisions are particularly valuable in the context of the luxury industry, where shareholders are often passive investors, preferring not to bear liability for the operations of a business in which they are not actively involved.

Then, in the case of Private Limited (Ltd) companies, there is no actual statutory authorised minimum shares capital requirement unless specified in the articles: in practice, most of the

[41] Limited Liability Partnerships Act 2000
[42] Limited Liability Partnerships Act 2000, s 10
[43] Companies Act 2006
[44] Companies Act 2006, s 7.
[45] DIGNAM Alan and LOWRY John, *Company law* (Oxford University Press 2022), p.6
[46] Companies Act 2006, s 3–4

Ltds are created with a symbolic £1. On the other hand, Section 763 of the companies act 2006[47] requires that the public companies have an authorised minimum shares capital of £50,000. In both cases, these provisions can be advantageous for a luxury firm. If the business is newly successful, even without yet generating significant profits, the owner may still be able to compete with more established companies. Conversely, since the luxury industry is a wealthy sector, a well-established company is unlikely to face difficulties in meeting the authorised minimum share capital requirement for a Public Limited Company.

As a result, although Private Limited Companies cannot be publicly traded[48], both Ltds and PLCs appear to be more likely adopted for luxury entities.

II) British corporate forms and the luxury industry

§ 20 – British luxury companies. First of all, most UK luxury companies have opted for the Private Limited Company (Ltd.) status. This is the case, for example, of *Vivienne Westwood, Charlotte Tilbury, Victoria Beckham, and Jo Malone*. Some of these brands, such as *Jo Malone*, are part of a larger group, while others remain independent. This sample from the luxury industry illustrates that UK brands generally opt for the Ltd. legal status as a starting point, which they can later expand upon by integrating into a broader corporate group.

Moving on, examples of luxury companies that have adopted the Public Limited Company (PLC) legal form are quite rare. In most cases, the parent company is publicly traded as a PLC, while its subsidiaries are not and are therefore structured as Private Limited Companies (Ltd.). This is precisely the case of *Burberry*: *Burberry Group PLC* serves as the publicly listed parent entity. This scenario is similar to the French model, where most companies are not publicly traded themselves but operate as part of a broader corporate group.

- **Section 3 : Corporate forms of American Luxury Companies**

In the United States, although numerous corporate forms exist (I), only a few are commonly chosen by luxury companies (II).

[47] Companies Act 2006, s 763
[48] Companies Act 2006, s 755(1)

I) American corporate forms

§ 21 – American Corporate forms. First of all, in the United-States, the law governing legal business entities may differ depending on the State. While some entities are almost uniformly regulated throughout the country, others like corporations are not. As a result, regarding corporations, for the sake of our analysis, only Delaware law (DGCL for Delaware General Corporation Law) and MBCA principles (Model Business Corporation Act Resource Center) will be mentioned.

§ 22 – American Corporate forms less likely to be used in the luxury industry. First of all, as in the United Kingdom, General Partnerships and Limited Partnerships in the United States are clearly less likely to be adopted by luxury companies. While the legal framework differs between the two jurisdictions, US and UK General and Limited Partnerships still share key structural characteristics.

First, General Partnerships are regulated by the Uniform Partnership Act 1914 (UPA) and the Revised Uniform Partnership Act 1997 (RUPA)[49]. Most states have either adopted these acts or drawn inspiration from them to draft their own partnership laws. The same statement has to be done regarding the Limited Partnership and the ULPA (2001) or RULPA[50]. Then, both the General Partnership and the Limited Partnership do not directly pay income tax. Instead, taxes "passe through" dividends distributed to their partners. Additionally, these entities cannot be publicly traded, and partners' interests are generally not freely transferable. Finally, general partnerships and limited partnerships do not offer limited liability, except for limited partners in the latter. As a result, while these structures may be suitable for lots of businesses, the luxury industry appears too large and complex for such entities. Thus, as in the United-Kingdom, General and Limited partnerships are unlikely to be chosen by luxury corporations **(See supra §18)**.

Then the LLC, the US equivalent of the UK LLP, appears to be too narrow for the luxury sector. Thus, this legal entity, governed by the Revised uniform Limited liability Company Act 2006 (RULLCA)[51], does not offer the possibility to significantly develop and expand. However, the

[49] Uniform Partnership Act of 1914 (UPA) and Revised Uniform Partnership Act of 1997 (RUPA).
[50] Uniform Limited Partnership Act 2001 (ULPA) and Uniform Limited Partnership Act 2001 (ULPA)
[51] Revised uniform Limited liability Company Act 2006 (RULLCA)

luxury industry is constantly growing and evolving. It is therefore difficult to state that luxury firms are likely to opt for an LLC. This could still be the case for a small luxury business still in development.

§ 22 – American Corporate forms best suited to the Luxury Industry. Finally, companies may opt for the close or public corporation status which are more suited to large businesses. In Delaware, they are regulated by the DGCL and by the MBCA principles in many other States. There are also governed by federal laws specifically regulating tax or antitrust matters. These large entities are well-organised since shareholders must elect a board of directors who then elects its officers and CEO or CFO. This well-structure corporation form is therefore well suited to the luxury industry which needs strong and leading public figures as they are the ones taking decisions to develop the brand.

Then, while only public corporations can be publicly traded, both public and close corporations can issue stock. This option is quite valuable in the context of a luxury business since it allows it to get rid of malicious shareholders and thereby adapt quickly to the market's needs. These shares are freely transferable in both public and close corporations which avoid creating "deadlocks" within the company. This is also extremely important in the context of a luxury firm as it can be subject to serious disagreements given the number of people involved. However, according to section 342(1) of the DGCL[52], a close corporation can only be composed of 30 shareholders maximum, contrarily to a public which has no limitation.

Finally, the IRS distinguishes S corporation (for special) and C corporation. Choosing the S corporation permits the firm to avoid double taxation. Opting for this status could be extremely valuable for average luxury companies who thereby will be able to manage the company more easily.

As a result, in theory, a luxury business should opt for a public, a close or a S corporation.

[52] DGCL §342(1)

II) American corporate forms and the luxury industry

§ 23 – American luxury companies. First of all, while the United-States welcome lots of luxury companies, most of them are incorporated in Delaware.

Many companies such as *Calvin Klein* chose the close corporation status. While this Delaware incorporated firm is not publicly traded, it is part of the PVH group, whose parent company is publicly listed.

On the other hand, *Ralph Lauren*, which is not part of any group, is a public corporation, thereby publicly traded and incorporated in New-York. As a result, an independent luxury company is more likely to be on the stock exchange than a subsidiary owned by a large luxury group.

Then, in practice, luxury companies rarely op for the S corporation which requires all shareholders to be American or US citizens[53] and imposes restrictions on investments. Public and Private corporations are thereby more commonly used.

Finally, while current regular corporate legal forms are mainly used by Haute Couture Houses, they may be challenged by more recent and practical entities.

CHAPTER 2) The hesitant use of innovative modern corporate forms in the luxury sector

While several innovative modern corporate forms such as Decentralised Autonomous Organisations (Section 1) and trusts (Section 2) could be adapted to Luxury fashion entities, the sector remains hesitant.

- **Section 1: The promising use of Decentralised Autonomous Organisations technology in the luxury sector**

DAOs present novel means of governance and community involvement (I) that could be adapted to the world of fashion and the luxury industry (II). However, absent legal personality, their success within the sector remains largely hypothetical (III).

[53] 26 U.S. Code § 1361

I) Overview of a mechanism with attractive features

§ 24 – The general definition. None of the three jurisdictions has ever attempted to draft an actual official legal definition of the Decentralised Autonomous Organisations (DAOs) technology within their body of law. However, the British Law commission emphasised that DAOs "are a new kind of internet-based collaborative organisation that coordinates people and resources using rules expressed in computer code. DAOs are part of what might be called the "crypto ecosystem"".[54] More specifically, Decentralised Autonomous Organisations form part of the crypto environment and have recently begun to be used for a wide range of purposes.

They are indeed an emerging form of organisational structure and are mainly used to make money more efficiently. However, this concept remains very broad and blurry, making its analysis and legal definition harder. Furthermore, this new form of collaborative exchange eliminates unnecessary administrative formalities, allowing users to concentrate entirely on their projects without having to comply with traditional regulatory requirements. Therefore, companies should pay more attention to this new form of entity.

§ 25 – DAOs and Luxury fashion companies. As the luxury sector continues to evolve and adapt to societal changes, it is natural to question whether Decentralised Autonomous Organisations could offer a viable alternative to traditional methods of structuring a luxury company. The use of the DAOs in the luxury fashion sector, in France, the United-Kingdom and the United States could indeed lead to the rise of new business models and therefore to a "truly creative golden age for the luxury industry".[55]

§ 26 – The blockchain. First of all, Decentralised Autonomous Organisations are primarily based on the innovant block-chain mechanism, yet they remain relatively known. It indeed "may appear to be moving far beyond traditional legal practice"[56] and provides the users an extremely practical way of doing business. The blockchain is made of plenty virtual records allowing the sharing of information as-well as the issuance and circulation of tokens[57].

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[54] THE LAW COMMISSION, *Decentralised autonomous organisations (DAOs),* 2024, URL: https://lawcom.gov.uk/project/decentralised-autonomous-organisations-daos/

[55] CATTANEO E., *Managing Luxury Brands: A Complete Guide to Contemporary Luxury Brand Strategies* (Kogan Page 2023) p.210

[56] DOWDEN Malcolm, *Book review: Blockchain, smart contracts, decentralised autonomous organisations and the law*, 170 NLJ 7873, p22

[57] MAGNIER V. et BARBAN P., *Blockchain et droit des sociétés* (Dalloz, 2020) p.9

Moreover, these assets are defined by the french monetary code as "any intangible asset representing, in digital form, one or more rights that can be issued"[58]. This issuance of tokens can also be based on smart contracts and therefore lead to the creation of an actual Decentralised Autonomous Organisation.

§ 27 – The Decentralised Autonomous Organisations' structure and members. While the regulation of DAOs might vary from one jurisdiction to another, their structure and governance remain fundamentally consistent.

Moving on, their way of arranging governance is unusual as the voting right depends on the member's tokens owing. The organisation is therefore controlled by its members, rather than by an elected board of directors of officers. This absence of such control is moreover explained by the lack of actual centralised hierarchy. Smarts contracts are however used to draft a set of rules and therefore regulate the governance, the project and the way the DAO is operated.[59]

DAO members are active participants and have the right to make proposals to guide the direction of the organisation's project. The token holder, called *contractor*, makes a proposal by submitting a smart contract and pays a provision which is then returned to him if the quorum is reached for the vote on this proposal. This proposal is also carefully analysed by the curators whose function is to ensure the organisation follows the conduct code.[60] Smart contracts are finally self-executed once the proposal is approved by the majority of the token holders.

DAOs therefore have a specific mode of operation which must nevertheless be adapted to the world of fashion.

II) <u>Is the use of Decentralised Autonomous Organisations actually adapted to the world of fashion and the luxury industry</u>?

§ 28 – The growing need for the use of the Decentralised Autonomous Organisation technique in the luxury sector. First of all, many authors and professionals claim that it exists

[58] Art. L. 552-2 C. mon. fin. (Fr.)
[59] MAUDOUIT-RIDDE Annie, *"L'organisation autonome décentralisée (DAO)",* BJB mai 2018, n° 117n4, p. 177
[60] *Ibidem*

a "compelling reason for organizing"[61] luxury companies differently. They also emphasise that the potential benefits of using the DAOs in the luxury industry are "undeniable".

This *necessity* of re-organising this sector is indeed observable across the three jurisdictions. Indeed, the luxury industry remains very private and exclusive, as the main and most famous brands exists since decades. There has been little change in recent years, demonstrating the need for renewal. For instance, *Louis-Vuitton* (France), *Burberry* (United Kingdom) and *Brooks Brothers* (United States of America) have all been created in the ninetieth century and are still very trendy. Contrarily, many small luxury brands struggle to break into the market because of these luxury giants' omnipresence. As a result, opting for a decentralised Autonomous Organisation would help those new comers challenge the traditional structure, gain visibility, and foster a more open and innovative market environment.

Additionally, decentralised autonomous organisations bring *transparency* to business. Indeed, "in DAOs, transparency is built right into the basis of the organization"[62]. Blockchains "promote greater transparency and efficiency" which builds "consumer trust and improves brand revenue".[63] This asset has the potential to generate increased profits and attract more customers to the luxury industry. We are currently in a time when consumers are highly conscious of their preferences, both in terms of what they value and what they reject. The growing demand for transparency in the fashion sector can significantly influence purchasing decisions, sometimes discouraging consumers from supporting brands that lack openness. Many authors and professionals[64] stress that this lack of transparency comes mainly from the multiplicity of third parties involved in the business, typical of luxury companies. In this context, the adoption of DAOs by luxury fashion companies could considerably strengthen their position and profitability, as such initiatives are likely to be positively received by transparency-minded consumers.

Then, the decentralised structure of the DAOs in itself could bring novelty and help luxury companies getting rid of their *directors' abusive control*. Indeed, most of them are directed by

[61] CAPPELLETTI Gloria Maria, *How DAOs are changing the fashion system*, Red Eye, 2022, URL: https://red-eye.world/c/how-daos-are-changing-the-fashion-system
[62] *Ibidem*
[63] De BOISSIEU, E., KONDRATEVA, G., BAUDIER, P. and AMMI, C. (2021), "*The use of blockchain in the luxury industry: supply chains and the traceability of goods"*, Journal of Enterprise Information Management, Vol. 34 No. 5, pp. 1318-1338.
[64] De BOISSIEU Elodie and KONDRATEVA Galina

the same owners and shareholders since decades. This monopoly therefore leads to a lack of innovation and refrain ambitious shareholders from advancing within the company. This is for example the case of *Hermès*, a french family-owned luxury brand in which the directors are part of the same family and are determined to keep the company away from external hostile investors. By distributing decision-making more equitably, DAOs could foster a more dynamic and inclusive governance model, encouraging fresh ideas, greater accountability, and ultimately, sustainable growth. Also, DAOs are driven by active member who all participate and contribute in the project. This is not automatically the case of large luxury companies, where most of the shareholders are passive and unable to communicate their ideas.

§ 29 – The growing need for the use of the Decentralised Autonomous Organisation: Examples. While this need for novelty within luxury companies can be observed in France, the United Kingdom, and the United States, the case of *Chanel*, a French luxury fashion house, offers a particularly relevant example. The brand has historically been owned by brothers Alain and Gérard Wertheimer, long-time heirs and highly discreet business figures. Chanel is well known for its private, family-run structure and notable lack of transparency, particularly regarding its financial performance. The company only began publishing selected financial data in 2018. This context makes Chanel a compelling example of a company where structural change, such as the introduction of DAOs, could help address governance opacity and bring a more democratic approach to corporate decision-making.

§ 30 – Is the Decentralised Autonomous Organisation a recognised entity? While DAOs' operation does not vary depending on the jurisdiction, their regulation might differ from a country to another.

First, in France, many conditions must be fulfilled by the entity in order to qualify as a recognised legal company. In general, the entity must comply with article 1128 of the French civil Code[65] which gives the conditions to a regular contract (being able to pass the contract and must agree on a lawful and certain content). Then, some more specific conditions are required by article 1832 of the French Civil Code to qualify as an official legal entity. Thus, members must all financially contribute to the company, participate in business profits and losses and identify as a group. The French "Cour de Cassation"[66] finally stated that shareholders/members

[65] Art. 1128 C. civ. (Fr.)
[66] Cass. com., 3 mars 2021, n° 19-10.693

must mandatorily desire to work together as an actual group: this requirement is called the "*affectio societatis*".
The Legal High Committee for Financial Markets of Paris (HCJP) applied these conditions to DAOs[67] and concluded that none of them were actually met. For example, it stressed that the *"affectio societatis"* criterion seems ill-suited to DAOs, which generally include hundreds or thousands of members. This argument is even more convincing as tokens are freely transferable, which promotes a permanent renewal of the DAO's members.

In addition to those requirements, a company must be registered to the trade and companies register (*registre du commerce et des sociétés*), if not, it will only be able to qualify as a *"société en participation"* or *"créée de fait"*[68]. However, since a DAO has no headquarters, it will unlikely be able to register in France as it requires the company to establish its real seat in France to do so. As a result, the only forms a DAO could potentially adopt would be *the "société en participation"* or *"créée de fait".* Given this, being recognised as a legal entity might be complicated for a DAO in France. This difficulty is also found in England where DAOs might face the same issue.

In England, authors such as William Edwards, barrister in London, claim that this legal issue could be solved by seeing DAOs as unincorporated companies (e.g., Partnerships). This solution is similar as the one brought by the French "doctrine". However, while this form of entity could be used by some luxury fashion companies, it appears limited in some aspects. In fact, opting for a partnership would be suitable for a small luxury company, as this legal form does not allow members to go public (being publicly traded) and exposes them to unlimited liability. However, most of luxury companies are usually publicly traded and the risks are so high (e.g., fashion trends change so quickly) that no shareholders would accept to be unlimitedly liable. These arguments regarding luxury companies apply to both the British and French approaches. Then, besides these considerations, both British courts and professionals stressed that the primary issue in DAO litigation would actually be to determine which law applies. William EDWARDS, quoting the United-Kingdom Supreme Court, "emphasised that an answer to this problem may be to apply the presumption that English law applies where

[67] HCJP, *Rapport sur la réception des organisations autonomes décentralisées (or « DAO ») en droit français*, 2024, p18-35
[68] French equivalent of the Partnership

neither party to litigation asserts that some other law should be applied".[69] Another solution would be to apply the law with which the DAO has the "closest and most real connection".[70] Regarding the luxury industry, these conflicts of law could be very challenging since luxury fashion companies primarily operate on a global scale.

Finally, in the United States of America, many States, such as New York or Arizona[71], have already recognised blockchain based contracts. This flexibility therefore eased DAOs' assimilation within the country. For instance, the concept of general partnership, comparable to the *"société créée de fait",* was used in the context of the *Sarcuni v. bZx DAO*[72] litigation, involving DAOs. Wyoming and Tennessee have gone a step further by creating a special status for DAO-based companies. They both allow those entities to incorporate and therefore being considerate as a recognised company. In Wyoming, the *"Wyoming Decentralized Autonomous Organization Supplement Act"*[73] created the DAO LLC, operated under existing LLC laws. In Tennessee, the Congress passed an act reforming the law and thus allowing people to create an actual DAO based LLC. However, despite this flexibility, an issue remains: what if the DAO sells unregistered securities. The SEC (Securities and Exchange Commission) pointed out that most of the registered DAOs were not operating in compliance with securities law.[74] This issue could be encountered by many DAO-based luxury companies that raise funds by issuing shares. As a result, they would need to exercise extra caution to avoid potential legal or regulatory backlash.

§ 31 – The limited use of Decentralised Autonomous Organisations in the luxury industry.

« The law is simply unprepared for DAOs »[75]. This statement from HINKES A. sounds actually a bit exaggerated, at least regarding the luxury fashion industry. Indeed, it seems like only an extreme small number of luxury fashion corporations decided to run their business through DAO based companies. In fact, while some DAOs regularly purchase lots of expensive fashion

[69] See *FS Cairo (Nile Plaza) LLC v Brownlie [2021]* UKSC 45, [2021] 3 WLR 1011, at [112]-[118]). (2022) 3 JIBFL 147
[70] See, *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chub* [2020] UKSC 38, [2020] 1 WLR 4117, at [36]
[71] See Arizona House Bill 2417 of 29 March 2017 and New York Assembly Bill 8780 of 27 November 2017
[72] HCJP, *Rapport sur la réception des organisations autonomes décentralisées (or « DAO ») en droit français* (n67), p18-35
[73] Wyoming Decentralized Autonomous Organization Supplement Act, 2021
[74] TONG Anna, *DAOs want to reshape fashion*, Vogue Business, 2021 URL: https://www.voguebusiness.com/mixed-reality/daos-want-to-reshape-fashion-heres-what-brands-need-to-know
[75] HINKES A., *« The Law of the DAO »,* 2021, URL: https://www.coindesk.com/markets/2016/05/19/the-law-of-the-dao

NFTs (e.g Dolce & Gabbana or Doge Crown), no real luxury brand opted for a DAO structured company yet.

However, several professionals are optimistic and point to Emma-Jane MACKINNON-LEE as an example to support their claims. She helps many people create their own DAO and plans to bring together several designers to create her own DAO based haute couture house. Some other projects are on the way like "*Greyarea*", a fashion DAO house to be (still at the project stage). As a result, although many ambitious projects emerge in France, the United Kingdom and the United States, the use of DAO technology has remained limited so far.

III) Legal personality: a necessary requirement to the DAOs' success within the luxury industry

§ 32 – The legal personality of DAOs: a contrasting legal treatment at the international level. The central issue of legal personality in relation to DAOs is particularly significant within the luxury industry. Legal personality is a fundamental requirement for companies in this sector, as it enables them to own and manage intangible assets such as trademarks, copyrights, and brand identity. Without recognised legal status, a DAO would face considerable challenges in protecting and commercially exploiting their intellectual property, which usually lies at the heart of any luxury brand's value.

First in France, according to The Legal High Committee for Financial Markets of Paris (HCJP)[76], as the law currently stands, it seems difficult to recognise the DAO as a sui generis legal personality, due to the lack of regulation in the field. Indeed, Article L. 210-6 of the French Commercial Code[77] is unambiguous: a company acquires legal personality only upon its registration with the Trade and Companies Register. This poses a significant challenge for DAO-based entities, as France adheres to the "matriculation" theory, which requires a company to have its registered office within French territory. Given the decentralised nature of DAOs, this territorial requirement renders their formal recognition in France highly problematic. One possible workaround could be the adoption of structures such as the *"société en participation"* or the *"société créée de fait";* however, these forms do not confer legal personality.

[76] HCJP, *Rapport sur la réception des organisations autonomes décentralisées (or « DAO ») en droit français* (n67) p37-86
[77] Art. L. 210-6 C. com. (Fr)

Consequently, under Article 1872 of the French Civil Code[78], ownership of assets would be held collectively by the members in a regime of "indivision", severely limiting the legal and financial autonomy typically enjoyed by corporations. This view is also shared under UK law, as partnerships do not have legal personality.

In contrast, the United States proves to be a lot more flexible than France and the UK, as some States allow DAOs to acquire legal personality if registered. As a result, DAOs are entitled to access associated legal rights, including the ability to sue and initiate transactions. In the BZX case[79], a platform involved in derivative futures transactions was deemed a legal entity by the Northern District Court of California. The order upheld the legal action against the group (the DAO) based on the chat accessible by the group. In fact, Judge Orrick ruled that the DAO had legal personality under California law, without really explaining why.

As a result, the three jurisdictions do not fully agree on the legal status of DAOs. This could pose a significant challenge for luxury fashion companies, which typically operate and settle transactions on a global scale. Thus, this lack of stability could cause the DAOs' downfall and refrain luxury entities from opting for a DAO based company. This uncertainty would also present a challenge, as without actual legal personality, a luxury fashion DAO would be unable to sue or be sued. However, luxury firms are among the first to be frequently taken to court over environmental issues (ESG/RSE) **(See Infra § 74),** as well as broader sustainability concerns, a domain that is becoming increasingly important to consumers. It is therefore essential to be able to hold DAO-based companies legally accountable. Besides this, Haute couture houses must be able to protect their intellectual property, which means they must be able to sue any party infringing on their rights.

§ 33 – Plausible solutions to a legal vacuum. France and the United Kingdom, unlike the United States, do not offer official solutions as such: however, experts have looked into the issue and tried to resolve the problem. In France and in the UK, "it's unclear whether who will be held liable for the DAO's wrongdoings" [80]: its creators, those who maintain the DAO or those

[78] Art. 1872 C. civ. (Fr)
[79] *Sarcuni v. bZx Dao*, 664 F. Supp. 3d 1100
[80] MAUDOUIT-RIDDE Annie, *"L'organisation autonome décentralisée (DAO)"* (n59)

who propose projects? [81] Many authors as J. CHACORNAC[82] have emphasised that the solution could be to hold all DAO members liable or to adopt the fictional theory. This mechanism would enable judges to treat the DAO as a recognised entity, thereby granting it legal personality. However, those elements are merely speculative and have not been explored by the French lawmaker yet.

As a result, none of the three jurisdictions are really aligned on this matter. Also, even though some States of the United State allow DAOs to qualify as an actual LLC, this flexibility has not yet been officialised at a federal level. It is therefore crucial to highlight the lack of understanding and regulation surrounding DAO technology in general, and specifically within the luxury sector. To conclude, while this modern form of governance could potentially revolutionise the luxury industry, it currently remains too limited in scope and structure to be fully adopted by fashion companies without significant further development.

- **Section 2: The alternative use of business trusts in the world of luxury and fashion**

While trusts appear to be a method of wealth management adapted to the luxury industry (I), the use of business trusts remains limited given their lack of recognition at a legal level (II).

I) The trust: a method of wealth management well suited to the luxury industry

§ 34 – Preserving family control in expanding luxury Houses: The Role of Trusts. First of all, it appears important to highlight that luxury houses are often owned by a few families wishing to keep power and control over the company. However, the more the firm expands, the more likely the families in question are to see their dominance run out of steam. As a result, in order to counter any potential loss of control, the trust could be seen as an interesting solution. It could indeed allow the management of the family assets and protect them from any external solicitations. The trust could therefore protect the company's intellectual property, crucial asset of a luxury fashion entity. Finally, even though France holds a divergent view on trusts, this statement remains applicable to all three jurisdictions.

[81] MAUDOUIT-RIDDE Annie, *"L'organisation autonome décentralisée (DAO)"* (n59).
[82] CHACORNAC J., *Statement made during the class of « Droit comparé des sociétés »,* September-December 2024

§ 35 – Generalities about trusts. Trusts provide beneficiaries with substantial protection from personal liability and brings confidentiality. This is indeed a significant advantage for luxury fashion companies, which must continually ensure that no confidential information is disclosed through their financial operations. However, although business trusts present plenty advantages, their recognition as legal entities remains complex within the three jurisdictions.

II) <u>The trust and the limits of its generalised institutional recognition</u>

§ 36 – Recognition across the jurisdictions. France holds a divergent view on trusts, as it simply does not allow them under domestic law. However, due to globalisation, it has been forced to adapt by recognising foreign trusts within its legal system. The French Cour de Cassation indeed once recognised foreign trusts in order to allow the trustee to intervene in a litigation in France.[83] In the meantime, the French lawmaker introduced the "fiducie", a French version of the trust, bearing similarities to the English and American models, though more limited in scope.

In the United Kingdom, trusts are allowed and highly used. While a trust can be implied, Article 53 of the Law of Property Act (1925)[84] requires the trust settlement to be written. Furthermore, trustees' duties are regulated by the Trustees Act (2000). Finally, in the United States, the trust is broadly recognised although the specific rules governing business trust may vary from State to State.

§ 37 – The business trust recognition across the jurisdictions. Contrarily to some States of the United States, France and the United Kingdom both do not recognise business trusts. In the United-States, Delaware passed a law called "*Delaware Statutory Trust (DST) act*". It therefore recognises business trusts as legal entity, separate from the trustee and beneficial owners.

As a result, as with DAOs **(See Supra § 33)**, the business trust is not uniformly recognised across the three jurisdictions. Furthermore, there is no credible example of a luxury business trust in France, the United Kingdom, or the United States. Moreover, the luxury fashion industry requires greater stability and growth opportunities, factors that the business trust does not offer.

[83] Cass. Com. 13 sept. 2011, n° 10-25.533
[84] VERLHAC Jérôme and DUTHEIL Philippe-Henri, *Juris Corpus Droit des associations et fondations*, Étude 4 - Droit comparé, Dalloz, 2016

Therefore, this legal structure appears too unstable and underdeveloped to be adopted by luxury firms.

Furthermore, besides their legal structure, these firms generally seek to expand while preserving their identity.

TITLE 2) The protection and enhancement of the identity and attractiveness of luxury companies: France, the United Kingdom and the United States

Luxury fashion companies often opt for a group structing strategy (Chapter 1), but may also adopt more refined internal corporate structures mainly focused on governance and maintaining control (Chapter 2).

CHAPTER 1) The generalised structuring of companies into groups of companies in the luxury industry

The legal organisation of luxury companies often takes the form of corporate groups, governed by a general legal framework that applies across industries (Section 1). In the luxury sector, forming such groups offers both strategic opportunities and operational constraints that must be carefully weighed (Section 2). This structure is also challenged by external pressures such as US tariffs, which force luxury groups to navigate between strategic overseas establishments and growing economic uncertainties (Section 3).

- **Section 1: Legal framework of the group of companies : general functioning and lack of derogatory treatment in the luxury industry**

While group structuring offers key strategic advantages for luxury companies (I), its effective implementation requires a thorough comparison of relevant legislation and practical examples across jurisdictions (II). However, it might be important to point out the absence of legal provisions specifically tailored to the luxury sector (III).

I) Key considerations in group structuring

§ 38 – The luxury industry: a sector in constant evolution. *"The luxury object ages, gets damaged, travels and repairs itself. It is even what distinguishes it from an ordinary object".* This quote from Jean-Louis DUMAS (Former Chairman and CEO of Hermès) shows how important adapting to customers is within the luxury industry. Indeed, fashion is a rapidly evolving sector that constantly demands innovation and adaptation. Thus, “the apparel industry

faces the business challenge of being in one of the most volatile industrial sectors"[85]. Competition is high and companies thereby need to react to this constant evolution by finding new ways of doing business. Creating luxury groups might be the solution as they help brand reinventing and reaching new branches of the luxury fashion industry. Thus, if a company aims to growth bigger, it will likely find benefit from creating a conglomerate or at least integrating one.

§ 39 – The conglomerate strategy within the luxury industry. The primary goal of luxury fashion companies is to erase competition and get stronger in order to grow larger. This economic strategy must mandatorily be coupled with an actual well designed legal strategy in order to ensure luxury companies are shielded from any liability. This argument is moreover supported by author and expert, Ian BREMMER.[86] Indeed, creating a conglomerate and subsidiaries can be challenging depending on the law of the targeted company's jurisdiction. It is therefore crucial to analyse French, British and American jurisdictions, as luxury companies might be tempting to branch out there.

II) <u>The necessary comparison of legislation and practical examples</u>

§ 40 – General questionings. Analysing how a conglomerate legally works is crucial since consequences might be different depending on the country. However, since most groups have subsidiaries all across the world, especially in France, the United-Kingdom and the United States, a great understanding of those jurisdictions' rules is essential. Regarding the luxury industry, benefiting from the legal personality is key, it is therefore important to considerate whether groups enjoy it. It indeed enables luxury companies to enter into contracts with numerous sectors but also to own intangible assets.

§ 41 –The French Legislation: generalities and structure. First of all, in France, the term "Conglomerate" refers to "the whole formed by several companies which, although legally independent, form a single economic unit due to close financial links".[87] Therefore, a conglomerate is composed of companies, called subsidiaries (or *sociétés filles* in French),

[85] BOLAND-DEVITO Joyce, *Creating Stability in the Fashion Industry by Using Corporations and Conglomerates,* 2018, 16 DePaul Bus. & Comm. L.J. 89, p4
[86] BREMMER Ian, *Managing Risk in an Unstable World*, Harvard Bus. Review, Jun. 2005, URL : https://hbr.org/2005/06/managing-risk-in-an-unstable-world
[87] DALLOZ, *Fiche d'orientation Dalloz : Groupe de sociétés* - Juillet 2023

controlled by a parent company (*société mère* in French). As a result, according to French law, the "*société mère*" gets to decide how the subsidiary will operate its business: strategy and decision wise. Therefore, in groups like *LVMH* or *Kering*, the parent company participates in the decision-making process of its subsidiaries (contractually or through creative input).[88]

Moreover, as France has no legislation specifically regulating conglomerates (*Groupes de société* in French), court decisions serve as precedents. However, article L. 233-1 s. and R. 233-1 of the French commerce code determine whether subsidiaries are actually considered as it by the law. It is indeed very important to distinguish between having an actual subsidiary, a branch or an ordinary stake in the company (a simple "participation" in french) **(See Infra §50)**. As a result, a company is considered as a subsidiary as soon as the s*ociété mère* owns more than half of its capital[89]. Contrarily, we talk of "participation" for a fraction of the capital between 10 and 50%.[90] According to Article L. 233-3 of the French Civil code, companies can also be considered as subsidiaries in case of an economic or functional control exercised by the controlling "*société mère*".

§ 42 –The French Legislation: Legal personality and other characteristics. First of all, France as a very restrictive way of granting legal personality to legal entities. Indeed, through article L210-6 of the French Code de commerce[91], France has opted for the "immatriculation" theory. As a result, entities must mandatorily register to the trade register in order to obtain legal personality, otherwise none will be granted. Thus, a group of companies cannot in itself be eligible to the legal personality.

The French "*Cour de cassation*" stated that without legal personality, a company will not be able to sue or conclude contracts for the sake of its business.[92] The Court has also ruled that an entity lacking this asset will not be able to be sued. These considerations are very important within the context of the luxury industry since companies absolutely need to sue or be sued in order to protect their immaterial assets. It is the reason why groups have a parent-company who benefits from the legal personality.

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[88] RAWLEY E., GODART F. C., SHIPILOV A., *Research article: How and when do conglomerates influence the creativity of their subsidiaries,* 2018, Strategic Management Journal, Volume 39, Issue 9 pp. 2417-2438
[89] Arts. L. 233-1 et seq et R. 233-1 et seq C. com. (Fr)
[90] Art. L. 233-3 C. com. (Fr)
[91] Art. L. 210-6 C. com. (Fr)
[92] Cass. Com. 2 avr. 1996, n° 94-16.380

Regarding the luxury sector, *LVMH* is a perfect example of the parent-subsidiary structure, as it operates through a parent company who benefits from the legal personality and controls a wide range of subsidiaries.

§ 43 – The British Legislation: generalities and structure. First of all, British rules governing conglomerates are quite similar to the French ones. Indeed, in the United-Kingdom, companies are also considered as subsidiary as soon they are under actual control of a parent company. A subsidiary is therefore defined as "a British company that is owned by a non-UK company. The British company is part of the same group as its parent, but it has separate legal personality, can enter into contracts, has limited liability and operates as a stand-alone entity".[93]

In the United-Kingdom too, a distinction must be done between a branch and a subsidiary **(See Infra §50)**. A branch refers therefore to an entity "created when a non-UK company sets up a physical place of business in the UK".[94] Regarding the structure of this conglomerate concept, British law has similarities with the French jurisdiction since the controlling company is also called "parent company" or holding and the controlled company is called subsidiary. In the United-Kingdom, the control can be exercised vertically (the parent owns a subsidiary who owns a subsidiary) or horizontally (the parent directly owns all the subsidiaries).[95] Therefore, to be considered as subsidiaries, all controlled companies must mandatorily be under "the ultimate ownership and control of the parent company"[96].

Moving on, in the UK, the parent/subsidiaries mechanism is highly used by companies in general and also often implemented within the luxury sector. For instance, Burberry Group plc is the holding company at the head of the Burberry Group structure. Moreover, the term holding is often used within the luxury industry and simply refers to the parent company. A holding is mainly created for tax purposes, in other words, to passively own subsidiaries assets.

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[93] ELEMENTAL, *Differences Between a UK Subsidiary and Branch,* Elemental, URL: https://www.elementalcosec.com/guides/differences-between-a-subsidiary-and-branch/
[94] *Ibidem*
[95] ROGAN Haydn, *Group Structure*, Weightmans, 2024 URL: https://www.weightmans.com/insights/group-structures/
[96] *Ibidem*

§ 44 –The British Legislation: Legal personality and characteristics. First of all, in the United-Kingdom, as in France, the issue regarding the legal status of groups/conglomerates is central. The Court of Appeal stated on the question that corporate groups do not have legal personality/entity. The court emphasised "the separate legal personality of each group company and the limited liability of shareholding companies"[97].

As a result, in the United-Kingdom too, corporate groups are not granted legal personality. This absence of legal personality means that the subsidiaries are controlled by the parent company who has the legal personality. Moreover, each subsidiary gets to keep its own one.

§ 45 – The American Legislation: generalities. In the United-States, like in France and in the UK, a group is composed of a parent and subsidiaries. US groups' structure is therefore simple: "The prototypical corporate group includes a parent company and its direct and indirect subsidiaries, each with a separate legal identity and its own legal rights and obligations"[98]. Moreover, Tapestry, a US luxury group is structured this way.

§ 46 – The American Legislation: Legal personality and characteristics. In the United States, similarly to France and the United Kingdom, corporate groups do not have legal personality. While laws vary from State to State, the structure of corporate groups remains consistent and is similar to the French and British models: "a subsidiary is an entity that is legally separate from its parent entity and from the other subsidiaries".[99]

§ 47 – French, British and American jurisdictions: the shared features. First of all, in all three countries, companies have an interest in forming groups of companies since they allow tax optimisation to be carried out. Indeed, « corporations can structure their subsidiaries and allocate their assets so as to reduce the parent company's (and the group's) exposure to liability as well as to shield subsidiaries from risk created by other affiliates' operations"[100]. This point will also be dealt in more detail in the next section since legislators are not necessarily very clear on the difference between tax optimisation and real tax fraud.

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[97] See *Adams v Cape Industries plc* [1990] Ch. 433, at 532
[98] HARPER HO, Virginia E., *Theories of Corporate Groups: Corporate Identity Reconceived* (June 17, 2012). Seton Hall Law Review, Vol. 42, 2012, URL: https://ssrn.com/abstract=1915745
[99] HOGAN Howard S. and MAGUIRE J. Bellah, *Fashion Law and Business: Brands & Retailers* (n11), *Chapter 1 § 1: 2. 11Organizational Structure*
[100] HARPER HO, Virginia E., *Theories of Corporate Groups: Corporate Identity Reconceived* (n98)

Secondly, in all three jurisdictions, the creation of a luxury group of companies results in the transfer of the intangible assets (intellectual property) of the subsidiaries to the parent company. This process appears interesting since it clearly permits the conglomerate to efficiently manage important key aspects of the business. This important legal aspect of the group structure will also be analysed more in depth within the next section as lots of legal issues might arise.

§ 48 – Examples of luxury groups across France, the United-Kingdom and the United States. First of all, many luxury companies have taken the step of creating actual corporate groups in order to increase their profits and expand their potential customer base. This is indeed the case for numerous French, British, and American companies.

In France, two groups stand out from the rest: *LVMH* and *Kering*. These two luxury giants, both nationally and internationally, alone, own the majority of the world's major luxury companies. Their analysis seems relevant, as they indeed raise many legal questions.

In the United-States, luxury groups are increasingly powerful and thereby try to compete with the French ones. For instance, *Tapestry* and *Capri*, American groups, are both getting stronger on a global level.

In the United-Kingdom, *Burberry* is one of the most famous groups in the country.

III) <u>The lack of specific legislation to the luxury industry</u>

§ 49 – France, the United Kingdom, and the United States do not offer a specific legal framework dedicated to corporate groups. Instead, all three jurisdictions apply general company law to group structures. However, although France is not a common law country, all three nations compensate for this lack of group-specific legislation through decisions handed down by their respective courts. Additionally, none of these three countries offer specific legislation for luxury companies in this area. As a result, such companies are required to apply general company law, which may at times be ill-suited to their specific structures. It is therefore worth considering whether lawmakers should attempt to legislate on the matter, rather than leaving the difficult task to the courts to decide on technical issues specific to the luxury industry.

- **<u>Section 2: Forming a group in the luxury sector</u> : between strategic opportunities and constraints**

While forming a group in the luxury sector presents advantages (I), it appears important to focus on taxes issues (II) and intellectual property concerns (III).

I) <u>Forming a group in the luxury sector</u>: advantages

§ 50 – Advantages: generalities. While forming a company in the luxury sector presents many advantages, most of them are essentially economic but still raise legal concerns. Thus, generally, forming a group in the Luxury fashion industry reduces competition. While customers might not benefit from this effect, companies do. Indeed, groups are increasingly seeking to eliminate competition in order to secure a large market share and therefore greater profits. REUTERS recently reported that "the outlook for standalone brands in the fashion and luxury sphere is becoming increasingly "tricky"".[101] Indeed, nowadays, in order to be successful, luxury companies are recommended to join or create a group as "the upper-most echelon of the fashion industry is firmly dominated by an increasingly small handful of mighty entities that have amassed collections of brands".[102] However, France, the United Kingdom, and the United States place great importance on ensuring that large companies do not violate competition law. This risk of monopoly will be deeper analysed within the next section since luxury companies might be limited by the authorities when trying to take over other companies **(See infra §101)**.

Additionally, from a business point of view, forming a group and therefore owning many subsidiaries (see the distinction between branch and actual subsidiary **Supra §41 and 43)** allows the parent to quickly get rid of one of them for commercial reasons. It is indeed more complicated to sell a division or a branch than a subsidiary, especially in the luxury industry. The division is in fact entirely part of the dominant society and does not have an individual legal personality. Therefore, getting rid of a division seems much more complex, from a legal point of view, than getting rid of a subsidiary. Thus, in a division sale, the dominant company

[101] THE FASHION LAW, *Brands Can Do Better with a Conglomerate Behind Them: Consolidation of the Luxury Industry*, The Fashion Law, December 11, 2019, URL: https://www.thefashionlaw.com/brands-can-do-better-with-a-conglomerate-behind-them-a-look-at-the-consolidation-of-the-luxury-industry/
[102] *Ibidem*

is likely to encounter many difficulties related to patrimonial issues, contractual obligations or employment (employment law). This statement holds true for France, the United Kingdom and the United States. As a result, owning many subsidiaries has very important practical advantages given its legal status. These questions of selling and buying luxury companies will also be dealt more in depth within the next section **(See infra §93)**.

§ 51 – Tax advantages. It is clear that luxury groups are among those that generate the most profits because of the products sold by the brands but also because of their presence in many countries across the world. This situation means that these groups and companies are more tempted than others to practice tax optimisation. Indeed, having many subsidiaries in different countries generally allows to take advantage of foreign tax systems that are often highly advantageous. This tax optimisation is practiced using various techniques but can sometimes lead to questions about legality, especially in the world of luxury where transparency is crucial. It is therefore interesting to analyse the question in a future subsection by comparing the French, British and American system. **(See infra §54)**.

§ 52 – Management of intangible assets and royalties. Forming a group generally allows the transfer of a subsidiary's intangible assets to the parent company. This advantage exists in France, the United Kingdom, and the United States. In the fashion and luxury sector, subsidiaries often generate royalties that must typically be transferred to the parent company through specific transfer methods. While this mechanism can be advantageous, it also raises several legal concerns, which will be explored in further detail. **(See infra §62)**.

§ 53 – Advantages: Legal Imperatives in the Luxury Sector. As a result, "well-managed luxury brands and their holding companies generate consistent revenue growth and operating margin expansion over time".[103] While, this statement is accurate for French, British and American luxury companies, they must nevertheless ensure a thorough understanding of the relevant legislation, or they risk facing significant consequences.

II) <u>Tax optimisation or tax evasion? A major challenge in the organisation of luxury groups</u>

[103] WEBSTER Merriam, *A Study of Luxury Companies* (n7)

§ 54 – Generalities. First of all, French, British and American conglomerates often take advantage of their structure to practice tax optimisation. While this technique is used by many companies across the three jurisdictions, it still remains differently regulated depending on the country. Additionally, in the context of the luxury sector, do heightened compliance requirements increase the risk of companies being sanctioned for tax evasion, even when they are merely engaging in tax optimisation? To answer this question, it is first necessary to analyse current legislations before specifically turning to the luxury industry. France, the United-Kingdom and the United-States do not have specific rules regulating luxury companies' tax optimisation.

§ 55 – The french legislation: Generalities. In France, taxation clearly seeks to encourage the formation of groups of companies[104]. Indeed, the lawmaker has opted for tax neutrality[105], which is a fundamental concept of French law: the tax regime must not influence the economic strategies and decisions of companies. French groups have the choice between two main tax regimes: the parent/subsidiary regime and the tax consolidation regime[106]. These allow companies to significantly reduce their dividend tax. However, French groups have understood that they can optimise even more by practicing "intragroup transactions". French tax authorities are very sceptical of this technique since it makes it possible to locate the "maximum profits where you pay the least tax".[107] This mechanism, which is in principle legal, is highly practiced by luxury groups.

§ 56 – The french legislation: *régime mère/fille* and the *régime de l'intégration fiscale*. First of all, the parent/subsidiary regime allows the circulation of profits without tax obstacles and therefore avoids double taxation: at the level of the subsidiary and at the level of the parent company. This regime is governed by Articles 145 and 216 of the General Tax Code[108] and applies when the parent company's stake in the subsidiary is greater than or equal to 5%. Dividends received by the company are thus exempt, with the exception of a threshold of 5%, which is taxable regardless of the final amount.

[104] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (LexisNexis, 2022), p903
[105] Neutralité fiscale in French
[106] *Régime mère/fille et le régime de l'intégration fiscal*e in French
[107] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p904
[108] Arts. 145 et 216 CGI (Fr.)

French law also allows the group to opt for the tax consolidation regime, when the parent company owns at least 95% of the capital of the subsidiary. Article 223 A of the General Tax Code[109] provides that each subsidiary shall make a separate declaration of its results while the parent company makes a global declaration of all the group's results. This technique makes it possible to offset the profits and deficits of all the companies in the group. However, when a subsidiary is located in France and its parent company is located abroad, it will not be able to claim tax consolidation status under any circumstances.

It is therefore very important to understand how these two regimes work since they are used by the largest luxury groups in the world given that France counts many of them. Kering and LVMH, for example, have now opted for the tax consolidation regime to govern the relationship between their parent company and its subsidiaries when they are located in France.

§ 57 – The french legislation: Intragroup operations. The French tax regime allows its companies to carry out intra-group transactions in order to optimise and reduce taxable sums. Subsidiaries located in France can indeed make advances to others but also practice intra-group assistance in order to assist another subsidiary in difficulty. These tax optimisation techniques may indeed be considered as tax fraud by the tax authorities if the transaction is not of an economic nature and is simply carried out in order to avoid taxation (abusive nature). Business ethics also dictates that transactions within the same group should be carried out at market price[110]. Finally, French companies are also tempted to locate the maximum profits in subsidiaries or parent companies located abroad. Moreover, this strategy is highly practiced by French luxury companies.

§ 58 – The UK legislation: Generalities. In the United-Kingdom, "the basic principle is that each company is a separate taxable entity for UK tax purposes, required to complete returns and account for tax to HMRC".[111] While some exceptions can be made, the United-Kingdom does not allow companies to opt for a tax consolidation ("intégration fiscale") in its strict sense as in France. However, companies can still use the "group relief" technique which allows companies to transfer its tax losses to another company in the same group (75% owned by the

[109] Art. 223 A CGI (Fr.)
[110] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p905
[111] PISENT MASONS, *UK corporation tax group relief*, Pisent Masons, 2023, URL: https://www.pinsentmasons.com/out-law/guides/group-relief

same parent). As a result, the "'claimant company" will be able to "use the loss surrendered to it to reduce its liability to corporation tax".[112] This tax regime is thus regulated by sections 101 to 188 of the Corporation Tax Act 2010 (CTA 2010)[113].

Moreover, the United-Kingdom, is a bit more flexible than France since 100% of the dividends received by the parent company from the subsidiary are exempt. This applies both to British and foreign subsidiaries. This favourable mechanism has been used by lots of European companies in order to escape their home country's tax regime. This is the case of luxury fashion companies such as Chanel who recently incorporated its holding in London, UK.

§ 59 – The American legislation: Generalities. The United-States are the perfect place for tax optimisation. Indeed, many States like Texas, Wyoming or Tennessee are extremely tax-friendly[114] and thereby welcome lots of major US companies. Thus, as in France, US firms seek to minimise their taxable profits by creating groups and incorporating the parent in a US tax-friendly State.

Then, like in France, groups can opt for the Consolidated Return Scheme. In the United-States, they are considerate as affiliated groups if they are "one or more chains of includible corporations connected through stock ownership with a common parent meeting the "80% vote and value test"[115]. Contrarily to the United-Kingdom, via consolidation, the IRS allows corporations to be viewed as one legal taxable entity.

As a result, since tax minimising is totally legal in the US, luxury companies do not have to worry about tax avoidance allegations. Given the specificities of the industry, they should instead be encouraged to use the Consolidated Return Scheme as it helps enhance transparency and facilitates internal restructuring, especially in the US where laws vary from States to States. However, abusing of this mechanism could lead to illegality.

§ 60 – Tax optimisation or tax evasion? examples within the luxury industry. First of all, France and the United-Kingdom are countries where the tax optimisation is highly used by

[112] PISENT MASONS, *UK corporation tax group relief* (n111)
[113] ss. 101–188 CTA 2010
[114] YUSHKOV A., WALCZAK J., LOUGHEAD K., *2025 State Tax Competitiveness Index*, US Tax Foundation, 2024
[115] SHAW Tim, *Consolidated Return Rules Modernized*, Thomson Reuters Tax & Accounting News, 12/31/2024

luxury companies and groups. This statement was in general even more accurate before Brexit since many french parent companies or subsidiaries were incorporated in the United-Kingdom. On the other hand, while tax optimisation is commonly practiced by US luxury groups, it remains relatively well-regulated. Consequently, it does not necessarily seem urgent for this jurisdiction to adopt special rules regulating the taxation of companies and luxury groups.

Then, LMVH, one of the most famous luxury groups in the world, very often uses tax optimisation to avoid taxes. The group has been regularly in the news because of its excessive practice of tax optimisation. Indeed, in September 2019, the tax authorities had ""suspicions" that it was pretending to carry out treasury operations in Belgium, as opposed to its French headquarters, in an effort to lower its tax bill in its home country". [116] The group had indeed moved its holding companies to Belgium, where the tax regime is much more flexible, hosting 81% of the group's shares. The Paris Court of Appeal finally recalled that the suspicions of fraud were unfounded and that, no tax fraud had actually been committed by the group.[117] It is clear, however, that the tax arrangement carried out by LVMH had the sole purpose of evading the French tax regime. Indeed, as its subsidiaries were located in France, the group used intra-group operations to transfer the maximum amount of income to Belgium and thereby pay the least amount of tax in France. The suspicions are all the greater as the group has since repatriated its holding companies to France. This technique is completely legal, as it uses lawful mechanisms mentioned earlier, but can sometimes be requalified as tax fraud if the group's sole goal is to evade the French tax authorities **(See Supra § 57).**

This example of LVMH shows how fine the line between legal and illegal is in France. However, the luxury industry is a sector that practices a lot of tax optimisation and which nevertheless remains very rarely condemned. In the absence of specific legislation for this industry and very vague case law, it is important to question the potential need for specific legislation for the world of luxury. A clearer definition of "abusive use of tax optimisation" in the context of luxury groups would be beneficial. However, it is clear that France seeks to maintain these giants within its territory and may not be inclined to pass legislation on this matter.

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[116] THE FASHION LAW, *LVMH Beats French Case Accusing it of Using Belgian Subsidiary to Evade Taxes in France*, The Fashion Law, September 14, 2020, URL: https://www.thefashionlaw.com/lvmh-beats-tax-case-over-belgian-subsidiary/#:~:text=As%20first%20reported%20by%20Bloomberg,enough%20staff%20to%20carry%20out

[117] Cour d'appel de Paris, Pôle 5 - chambre 15, 9 septembre 2019

In addition, Kering, a French group, has also been called out on several occasions. Indeed, in 2019, the National Financial Prosecutor's Office explained that the group was "under investigation since February 2019 for tax fraud".[118] French tax authorities had indeed taken up a case in which the group had tried to avoid paying taxes in Italy and France, and had therefore transferred about 20 employees from its French or Italian offices to Switzerland as part of tax optimisation. This umpteenth investigation into tax fraud in the luxury industry demonstrates how much stricter French legislation is necessary. This argument is further reinforced by the fact that transparency and compliance are key principles in the luxury industry.

In 2012, the Kering group also considered transferring its tax residence to the United Kingdom, where the tax regime is more advantageous. This project was finally abandoned not for legal reasons but for reputational reasons. Neither the French nor the English courts reacted to this attempted fraud disguised as tax optimisation. Given the lack of legislation and unclear case law on the matter in both countries, it is appropriate to ask whether, in the event of prosecution, the group could have been convicted of tax fraud. This legal vacuum seems to benefit luxury groups that play on this ambiguity and are in fact very rarely sanctioned.

§ 61 – The general state of the law and Brexit effects. First of all, it is important to note that, from a consumer perspective, luxury companies are increasingly held to standards of transparency and sustainability. However, from a legal standpoint, no specific rules apply exclusively to luxury groups. This observation holds true for France, the United Kingdom, and the United States. This legal vacuum forces courts to apply general corporate group law to luxury companies, which in reality should be governed by a legal framework tailored to their specificities. Indeed, the luxury sector is a key industry in the global economy, as it contributes significantly to the French, British, and American economies. It also engages very frequently in tax optimisation practices.

Thus, given that no specific legal framework is applied to them and that general company law is typically respected, it is difficult to systematically characterise their tax optimisation strategies as tax evasion. The only grounds for reclassifying such practices as tax fraud would

[118] THE FASHION LAW, *Kering Confirms French Financial Probe Over Alleged Avoidance of $3 Billion in Taxes*, The Fashion Law, December 17, 2020, URL: https://www.thefashionlaw.com/kering-confirms-french-financial-probe-over-its-alleged-avoidance-of-3-billion-taxes/#:~:text=Billion%20in%20Taxes-,Gucci's%20parent%20company%20Kering%20has%20been%20"under%20investigation%20since%20February,the%20midst%20of%20probing%20the

be the abuse of these optimisation mechanisms, or more broadly, the luxury industry's overreliance on tax optimisation. Another factor that could lead groups to refrain from such practices, without any intervention from three jurisdictions' lawmakers, is reputation. This non-legal notion, shaped by consumer perception, could indeed deter luxury groups from engaging in borderline practices, even in the absence of any regulatory framework specific to the sector.

Finally, Brexit could change everything and lead to the reclassification of certain mechanisms which, prior to Brexit, were viewed as tax optimisation but may now be regarded as tax fraud. It is indeed worth questioning whether membership of the European Union (EU) serves to limit the prosecution of certain luxury groups creating holdings or subsidiaries within the EU. Being part of the European Union certainly reduces the risk to be convicted for tax avoidance mainly because of the freedom of movement within the European Union. Companies are free to incorporate and branch out across members countries without concerns about illegality. However, Brexit put an end to this: "freedom of establishment has ceased for the UK"[119]. Consequently, the likelihood to be convicted for tax evasion may be higher for luxury companies. Although no specific legislation applies to luxury firms, Brexit could still affect their tax optimisation strategies.

III) Intellectual property, royalties and intangible assets in general: how do luxury groups organise their management?

§ 62 – Royalties and intangible assets. Trademarks, designs, patents, and other intellectual property rights are central concerns in the luxury sector. They indeed make the group's value and are very often subject to transactions within the luxury group. This management of the royalties and intangible assets is, first of all, a way for the companies to manage their amount of tax due. They also help increasing the value of the parent company and are more easily manageable when controlled by a unique entity. This observation holds true for companies and groups incorporated in France, the United Kingdom, and the United States.

§ 63 – Intangible property of the intellectual assets of subsidiary companies. First of all, in France, subsidiaries usually have to transfer the royalties earned out of its intangible assets' rights to the parent company. This mechanism is indeed allowed by French law in order to

[119] DIGNAM Alan and LOWRY John, *Company law* (n45), p.55

enable groups to centralise all the assets within the same entity. This is a valuable aspect in the context of luxury companies given the importance of subsidiaries asset's management in the field. Indeed, "luxury companies are traditionally very concerned with protecting their brand image as well as the design of their products."[120] The United-Kingdom and the United also enable subsidiaries to transfer all its intangible assets to the parent company in order to ensure their management.

§ 64 – Tax issues and management of royalties in the luxury industry. Generally, in France, the United-Kingdom and the United States, royalties are one of the greatest revenues of luxury companies. They can therefore significantly increase the amount of taxes due if no optimisation is done. In order to avoid this scenario, parent companies usually grant their subsidiaries the right to use the brand through licensing. In exchange, subsidiaries transfer the royalties to the parent in order to reduce their benefice.

Here too, this technique is pure optimisation but can be requalified as fraud in case the group does not follow the rules regulating intra-group transactions. Here, the issue is the same as the one spotted above **(See Supra § 60 and § 61)**: knowing that luxury groups heavily rely on royalties' management to minimise taxes, what is the fine line between tax optimisation and tax evasion? While this legal vacuum can be identified in France, the United-Kingdom and the United-States, as stated above no official solution has ever been provided by the three jurisdictions.

Years ago, in the United-Kingdom, Vivienne Westwood has been called out for abusive tax optimisation as the group was drastically reducing its taxes by monitoring a smart royalties' management. This was also the case of LVMH in Belgium or Capri Holdings in the United-States. However, none of these groups has ever been prosecuted for practicing abusive intra-group royalty transactions.

§ 65 – Intellectual property, groups of companies and Brexit. Since Brexit, French luxury companies incorporated in the United Kingdom may face difficulties when managing their assets and royalties. Indeed, Brexit means the end of European tax directives and the increasing

[120] GIMALAC L., *Les menaces : nouveaux concurrents et outils juridiques pour protéger le "made in", Luxe, la fin de la volupté,* Géoéconomie, 2009/2 n° 49, Éditions Choiseul, p.37-49, URL: https://shs.cairn.info/revue-geoeconomie-2009-2-page-37?lang=fr

complexity of intellectual property rights protection. Nevertheless, US luxury companies are less likely to be affected by Brexit.

For example, few years ago, French company "Chanel" left France for the UK in order to practice tax optimisation and organise its assets management. In this context, time will tell whether its long term-strategy has been impacted by Brexit. However, the new agreements concluded on 19 May 2025[121] between the United Kingdom and the European Union may pave the way for other broader agreements.

- **<u>Section 3: Luxury groups facing US tariffs</u> : between strategic trade-offs and economic uncertainties**

While a quick explanation of the concept of tariffs is necessary (I), it is equally important to examine their effects on luxury groups' desire to extend (II).

I) <u>Quick explanation of the concept of tariffs</u>

§ 67 – The context and definition. While tariffs are used by many countries around the world, those imposed by the United States have become a real source of concern. They simply refer to the level of taxes imposed by one country to others. However, taxes can seriously impact companies' businesses. Indeed, "tariffs are taxes imposed by a government on goods and services imported from other countries"[122]. They are thus primarily impacting foreign companies, which now have to find ways to counter them.

§ 68 – Tariffs imposed by President Trump. In the United States, Article I, Section 8 of the Unites State Constitution argues that Congress has the power to "lay and collect Taxes, Duties, Imposts and Excises"[123] including tariffs. However, Section 301 of the Trade Act of 1974[124] enables the US President to impose tariffs on countries that engage in unfair trade practices. Additionally, Section 232 of the Trade Expansion Act of 1962 and International Emergency

[121] UK-EU Agreements, 19 May 2025
[122] HAHN Clarissa, *Tariffs 101: What are they and how do they work?*, Oxford Economics, 19 Mar 2025, URL: https://www.oxfordeconomics.com/resource/tariffs-101-what-are-they-and-how-do-they-work/
[123] U.S. Const. art. I, § 8
[124] Section 301, Trade Act of 1974 (19 U.S.C. § 2411)

Economic Powers Act (IEEPA) of 1977[125] allow the President to intervene in case of national emergency. As a result, in April 2025, President Trump relied on these texts, arguing that the United States were threatened by an economic aggression from China. He therefore imposed tariffs on almost every country. While both France and the United Kingdom were targeted, Trump imposed an additional 10% tariff only on the United Kingdom, compared to higher rates applied to France and the European Union who faced a 50% tariff. EMILY LEY PAPER Inc., represented by the New Civil Liberties Alliance, challenged these taxes arguing that they violated both statutory and constitutional constraints. No decision from the Court has been taken yet.

II) Tariffs and Luxury companies

§ 69 – The impact of American tariffs on luxury fashion companies. A topical question seems interesting to address: To what extent could the tariffs imposed by the Trump administration on foreign companies and imports encourage the formation of groups within the framework of the luxury industry? While this analysis will be American focused, it will also discuss of their impact on French and British luxury companies.

§ 70 – What legal strategy to counter these tariffs. Legal experts urge the fashion industry to adopt large and well-designed strategies in order to resist and counter Trump's Tariffs. Indeed, counsels at ARENTFOX SCHIFF emphasised that companies must urgently develop "a multifaceted approach to mitigating the impact of significant tariff increases and be prepared to pivot quickly".[126] One of those potential tactics for luxury companies would be to use their structure and create subsidiaries within the United States. This strategy could indeed be easily implemented in the luxury sector since giants of fashion and luxury already have subsidiaries in France, the United Kingdom and the United States. As trade routes and commercial legal relationships are already well established between those three jurisdictions, this strategy should not be particularly difficult to implement by the luxury industry. As a result, while luxury companies and big companies in general may face lots of external crises throughout their lifetime, they should always use legal tools to overcome them.

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[125] Section 232, Trade Expansion Act of 1962 (19 U.S.C. § 1862) and International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1707 (2018)

[126] THE FASHION LAW, *Trump Tariffs: What Retail Companies Need to Know About the New Trade Regime*, The fashion law, April 10, 2025, URL: https://www.thefashionlaw.com/trump-tariffs-what-retail-companies-need-to-know-about-the-new-trade-regime/

This solution is supported by counsels at ARENTFOX SCHIFF who argue that companies should "reassess their supply chains, make strategic global sourcing and manufacturing decisions, and review contractual obligations to protect from tariff risks."[127].

§ 71 – Example of companies that have already branched out in the United-States. Fashion and luxury companies have already explored or planned to relocate their manufacturing in the United States to mitigate Trump's tariffs.

This is indeed the case of *LVMH* who has already opened many factories in the United-Stated during Trump's first Presidential term. The group has for example opened factories in Texas where it hopes to continue manufacturing its goods despite the operational issues it faced after relocating. As a result, although legal commercial routes are already well established between France, the United-Kingdom and the United-States, the process remains challenging. Indeed, LVMH struggled with the factory's productivity and faced numerous labor legal issues.

Regarding British companies, while some luxury cars brands such as *Land Rover* have also branched out in the U.S, luxury fashion companies still appear reluctant to do so. Majority of these companies indeed rely on a price increases strategy. In France, this is for instance the case of *Hermès* and *Kering* who declared increasing their prices within the US market. As a result, while Trump's tariffs may force companies to use legal strategies and create subsidiaries to the United-States, this scenario might actually not be entirely beneficial for luxury fashion companies.

§ 72 – Legal issues raised by this "parent/subsidiary" strategy. First of all, by creating subsidiaries in the United-States, luxury firms seek to obtain the "Made in the US" label and thereby avoid taxes. However, a legal issue arises: how is it obtained and granted? Authors claim that this area "will likely be subject to increased attention and enforcement".[128] The FTC therefore released an updated version of its *"Final Rule" in July 2024*, explaining how companies could use the "Made in USA" label on their products. Companies may now be subject to civil penalties in case they break the law. As a result, French and British luxury

[127] THE FASHION LAW, *Trump Tariffs: What Retail Companies Need to Know About the New Trade Regime* (n126)
[128] THE FASHION LAW, *As Companies Contemplate Reshoring, a Look at What "Made in USA" Means*, The fashion law, April 4, 2025, URL: https://www.thefashionlaw.com/a-fashion-talks-reshoring-made-in-usa-rules-come-under-the-microscope/

companies face significant risks. Thus, this legal issue increases the legal complexity of using a subsidiary-based strategy to avoid tariffs and calls for careful oversight.

Secondly, as discussed earlier **(See Supra § 60 and § 61)**, luxury fashion companies often attempt to relocate their holdings or subsidiaries to countries with more favourable tax regimes in order to save money and avoid domestic taxation. This strategy, known as tax optimisation, can sometimes be reclassified as tax fraud. It is therefore worth considering whether American courts might interpret tariff-avoidance strategies in a similar light and pursue convictions accordingly. This issue has not been addressed by the American jurisdiction but may be worth considering.

§ 73 – Practical criticisms about American tariffs. First of all, as Trump's tariffs are too recent and still unknown, it seems too soon for French and British luxury companies to branch out overseas. They might first have to take a passive approach before adopting legal structuring strategies, as they may lose a lot. Contract agility appears to be their best option for now. Indeed, since President Trump seems to be testing boundaries, companies are not shielded from illegality and should be careful. Additionally, manufacturing products within the United-States might have for consequences to compel luxury fashion companies to leave their famous "Made in France" or "Made in the United-Kingdom" for a less trustworthy "Made in the United-States". This might impact their profits, as French and British consumers often perceive US products as being of lower quality.

Finally, in order to expand, luxury companies rely on group structuring strategies but also seek use other proper legal tools at their disposal.

CHAPTER 2) Corporate structures in the luxury industry: between Governance and Control

While the luxury industry is increasingly facing complex environmental and social expectations (Section 1), luxury fashion firms shall adopt robust legal strategies to protect their intellectual assets and image (Section 2). Finally, luxury groups seek to balance market expansion with the preservation of family heritage and control (Section 3).

- **Section 1: The major challenge of effective management of environmental issues in the luxury fashion industry**

While the emergence of an increased consideration of environmental issues by luxury houses deserves initial attention (I), it is equally crucial to explore the risks of greenwashing in the sector (II), before assessing the uncertain impact that poor environmental management may have on the potential initial public offerings (IPOs) conducted by luxury houses (III).

I) The emergence of an increased consideration of environmental issues by Haute couture houses

§ 74 – The increasing importance of environmental concerns within the luxury industry. Environmental issues are getting more important these days and thereby compel the luxury industry to comply with both consumers' expectations and legal obligations.

Indeed, luxury companies surprisingly tend to be increasingly responsive to environmental concerns. One reason for this observation might be linked to the social and economic pressure consumers exercise on the industry. Indeed, "only pretty recently has sustainability started to be considered an integral part of strategic management".[129] Environmental issues, however, represent only a small part of a luxury company's activism. Companies may also engage in social and governance concerns. These observations hold true for France, the United-Kingdom and the United-States.

[129] CARCANO Luana, *Strategic Management and Sustainability in Luxury Companies* (n22), p1

Environmental, social or governmental actions taken by luxury companies are now used to rank them and assess their potential for long-term success. For instance, according to the International Scientific Conference on Economic and Social Development, *Hermes* (France) and *Capri Holdings* (United-States) have very poor governance and insufficient environmental score. Whereas, *Kering* (France), *LVMH* (France), *Burberry* (United-Kingdom) show a higher overall score.[130]

§ 75 – The recent emergence of sustainability concerns and luxury companies. "Sustainability is about much more than our relationship with the environment; it is about our relationship with ourselves, our communities, and our institutions".[131] This quote from SEIDMAN (2007) shows how much sustainability became important for customers as it clearly impacts the way we behave and consume. This therefore led lawmakers to pass laws on this matter and thereby regulate the market. However, in order to ensure a proper understanding of today's regulations, it appear crucial to study the evolution of luxury from no regulations to times of "sustainability".[132]

Therefore, luxury was first an exclusive way of living and was totally opposed to the concept of sustainability or more broadly environmental and social concerns. "This leads to the idea that, because of the luxury characteristics, luxury sector finds it hard to develop sustainable model".[133] Indeed, the luxury sector was at first seen like incompatible with concerns like environmental actions given its characteristics. Then, the lack of sustainability actions started to negatively impact luxury companies by exposing them to risks of public disapprobation. The degree of preference for a brand indeed started to vary depending on its number of actions taken by the company. Sustainable luxury can be defined as "the concept of returning to the essence of luxury with its traditional focus on thoughtful purchasing and artisan manufacturing to the beauty of quality materials and to respect for social and environmental issues".[134]

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[130] 99th INTERNATIONAL SCIENTIFIC CONFERENCE ON ECONOMIC AND SOCIAL DEVELOPMENT, *Sustainability: the ultimate luxury* (n9), p10-11
[131] 99th INTERNATIONAL SCIENTIFIC CONFERENCE ON ECONOMIC AND SOCIAL DEVELOPMENT, *Sustainability: the ultimate luxury* (n9), p2
[132] *Ibidem*
[133] RAHMAN & YADLAPALLI, 99th International Scientific Conference On Economic And Social Development, *Sustainability: the ultimate luxury* (n9), p2
[134] 99th INTERNATIONAL SCIENTIFIC CONFERENCE ON ECONOMIC AND SOCIAL DEVELOPMENT, *Sustainability: the ultimate luxury* (n9), p2

The luxury market then shifted from customers' pressure to real legal frameworks. France is one of the pioneers in the field, then followed by the United-Kingdom and more recently the United-States. From a social and environmental perspective, the luxury market, and the market in general, went from not being regulated at all to being strictly controlled in terms of social and environmental issues. While they are nowadays obliged to comply with ESG[135]/RSE[136] rules, some regulations implementations remain complicated.

§ 76 – Definition of ESG and RSE. First of all, ESG is a broad term used both in the United Kingdom and in the United States to include the rules governing environmental protection, social responsibility, and corporate governance practices within companies and among investors.

On the other hands, RSE is the french version of ESG. It also sets the rules regulating social and environmental matters. They are all based on the sustainability concept but now officially compel companies to comply with numerous rules.

This area of law is pretty important since luxury companies are influent and directly impacted by the ESG/RSE regulations. Jean-Noël KAPFERER recalled that they are "potential leaders and reasonable influencers for change in sustainability issues".[137] As a result, ensuring that they comply with the three jurisdictions' requirements becomes crucial.

§ 77 – The French RSE and luxury companies: due diligence. First of all, in France, due to the growing number of RSE laws, companies must comply with more and more ethical practices (in their internal relations and in their interactions with external partners).

In March 2017, the due diligence requirement was introduced by the French lawmaker in order ensure effective protection of individuals' rights within groups of companies. Article 225-102-4-I of the French Commercial Code[138] provides that targeted groups are the ones employing:

1. More than 5,000 workers in France (if the subsidiaries are incorporated in France) or,
2. More than 10,000 workers worldwide (if the subsidiaries are incorporated overseas).

[135] ESG for Environmental, Social and Governance
[136] RSE for Responsabilité sociale et environnementale in France
[137] 99th INTERNATIONAL SCIENTIFIC CONFERENCE ON ECONOMIC AND SOCIAL DEVELOPMENT, *Sustainability: the ultimate luxury* (n9), p3
[138] C. com. L. 225-102-4 I (Fr)

French luxury groups are very likely to fall into one of these two categories and thereby being bound by this law.

Moving on, the purpose of this law is to identify and prevent risks related to human rights violations, environmental damage, and corruption. Its scope is broad, as it applies to a wide range of stakeholders, including the State, contractors, employees, and consumers.

When implementing their plans, luxury groups subject to this law will therefore need to consider a broader field of collaborators. However, the law does not clearly specify who, within the luxury sector, will be entitled to benefit from the actions taken by the relevant groups. Yet, the luxury industry relies on numerous trades and professions that may have an interest in asserting their status as stakeholders. To date, neither the lawmaker nor the courts have addressed this issue. This legal uncertainty could end up being very costly for French luxury groups, which may face legal action from various parties seeking compensation for damages suffered.

This duty of due diligence was reinforced by a European directive adopted by the European Commission on June 13, 2024[139]. However, this directive has a broader scope than current French law and therefore targets a larger number of companies.
Next, given their size and significant turnover, it is clear that luxury companies will be affected by this directive. However, it is worth considering whether they will benefit from special treatment and, if not, to what extent they will be bound by the directive's provisions. Also, could these increased obligations regarding vigilance and RSE push French luxury companies to relocate their headquarters to England or the United States, both non-EU members?

§ 78 – French companies' status and luxury companies. The "loi Pacte" of May 22, 2019, via Article 1835 of the Civil Code[140], now allows companies that wish to do so to include a *raison d'être* (purpose) in their articles of association. This *raison d'être* is defined by the French

[139] DIRECTIVE (EU) 2024/1760 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859
[140] Art. 1835 C. civ.

government as "the long-term project within which the company's corporate purpose is embedded." [141] "*LVMH*" and "*Kering*" have, for example, opted for such purpose.

Companies can also opt for the status of *"Société à mission"*[142] (public interest Company) and thus strengthen their socio-environmental commitment. Consequently, failure to comply with the commitments attached to this status carries serious legal consequences. However, French luxury companies remain hesitant. Indeed, only "*Chloé*" has both adopted a *raison d'être* and opted for the status of a *"Société à mission"*.

Since this status is optional, it is therefore appropriate to ask whether, given the impact of luxury companies in France, the provisions of Article L. 225-102-4 I of the French Commercial Code should be imposed on them. On the other hand, as mentioned above **(See Supra § 77)**, such obligations could push them to exile themselves in more indulgent jurisdictions. Indeed, many people believe that luxury and sustainability are incompatible. This is the case of ACHABOU & DEKHILI, who state that at first sight, "luxury represents uniqueness, opulence, and prestige, while sustainability refers to principles of ethics and philanthropy.".[143]

§ 79 – The American and English ESG and luxury companies. Contrarily to France, in the United-Kingdom and the United-States, the legal framework regulating socio-environmental concerns is called ESG.

First of all, since the 6 April 2022, in the United-Kingdom, "companies registered in the UK are potentially subject to corporate environmental and social disclosure obligations under the Companies Act 2006".[144] British companies might also have to comply with other related regulations and additional requirements targeted by the Disclosure, Guidance and Transparency Rules (e.g., gender pay reporting). Under the NFSI[145] regime, the law also compels certain companies to disclose information about "environmental matters, employees, social matters, respect for human rights and anti-corruption and bribery".[146] The government has also released

[141] LE MINISTERE DE L'ÉCONOMIE ET DES FINANCES, *PACTE : Redéfinir la raison d'être des entreprises*, 2019 URL : https://www.economie.gouv.fr/loi-pacte-redefinir-raison-etre-entreprises
[142] C. com. L. 225-102-4 I
[143] 99th INTERNATIONAL SCIENTIFIC CONFERENCE ON ECONOMIC AND SOCIAL DEVELOPMENT, *Sustainability: the ultimate luxury* (n9), p.3
[144] HOGAN LOVELLS, *2025 Lexology Panoramic: Luxury & Fashion United Kingdom* (LexisNexis 2025), p.4
[145] Non-Financial and Sustainability Information Statement
[146] HOGAN LOVELLS, *2025 Lexology Panoramic: Luxury & Fashion United Kingdom* (n144), p.5

non-binding guidance in order to help companies reaching their socio-environmental goals. The UK jurisdiction has moreover announced that by 2025, that all companies will have to comply with the Task Force on Climate-related Financial Disclosures (TCFD).

In the United-States, both the federal and state levels can pass ESG laws. On a federal level, the SEC is the authority in charge of drafting public companies related laws and controlling their implementation. It has moreover recently proposed new rules to equally regulate publicly traded companies' disclosures. Finally, US companies are still waiting for the release of the Federal Trade Commission's Revised Green Guides.

Finally, while both the United Kingdom and the United States have never passed any ESG laws specifically regulating the luxury industry, the sector remains controlled by ordinary laws. However, like in France **(See Supra § 77 and § 78)**, as these legal provisions have been recently introduced, luxury companies might face difficulties to implement them.

§ 80 – Compliance with the ESG/RSE rules and luxury companies. French, UK and American luxury companies must imperatively comply with the law since a non-compliance could negatively impact the business. This opinion is moreover supported by ALLISON C. HANDY; KRISTINE E. KRUGER AND THOMAS TOBIN who argue that "fashion companies should consider reporting in accordance with one or more of these standards to provide investors with consistent and useful information".[147]

Consumers and public opinion often criticise luxury companies' lack of actions and transparency. They are, for example, regularly called out for lying about the origin of the materials used to manufacture their products. However, the broad application of ESG/RSE rules might enable courts to compel companies to be more transparent about those materials. In France, for instance, *Hermès* (France) has already been called out for using exotic skins (crocodile, lizard) in the production of their Birkin bags. A new complaint was recently filed. Therefore, in the event that Hermès adopts the status of a *"Société à mission"*, it is interesting to ask whether a court could rely on this status to hold the brand liable for failing to comply.

[147] HANDY Allison C.; KRUGER Kristine E. and TOBIN Thomas, *How The Fashion Industry Can Mitigate ESG-Related Risks* (LexisNexis 2023), p.2

Finally, luxury companies must ensure to adopt the right strategies in order to comply with the current regulation. They could indeed, rely on specialised committees to take the right decisions, "be prepared to respond to any challenges with verifiable evidence of compliance"[148] or ensure they disclose relevant facts when the law requires to. This equally holds true for France, the United Kingdom and the United-States.

II) The risk of greenwashing within the luxury industry

§ 81 – The risk of greenwashing within the luxury industry. The issue of greenwashing in the luxury sector is a central concern. Indeed, given the sector's image of excellence and exclusivity, luxury fashion houses are sometimes tempted to engage in greenwashing. It "occurs when a company concurrently engages in both negative environmental practices and positive communication about their environmental performance".[149]

§ 82 – The legislation. In France, a law dated 22 August 2021, known as the Climate and Resilience Law[150], punishes greenwashing through the concept of misleading commercial practices (competition law). France has also passed a law prohibiting companies from claiming that their product or service is carbon neutral unless concrete evidence supports the statement.[151] The United-States has similar regulations in this field. Indeed, the FTC (Federal Trade Commission) has the mission "to create and enforce regulations that prevent consumer misinformation"[152]. It had, for example, published the Guides for the Use of Environmental Marketing Claims ("Green Guides") in order to help companies meeting the law's expectations. The SEC (Securities and exchange commission) also plays a key role in regulation of greenwashing as it "focuses on securities law and its relation to climate disclosure". The SEC is for example making sure that companies comply with article 10b-5 of the Exchange act (disclosure provisions). Finally, The Lanham Act provides that consumers can hold companies liable of false advertisement through a civil action.

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[148] HANDY Allison C.; KRUGER Kristine E. and TOBIN Thomas, *How The Fashion Industry Can Mitigate ESG-Related Risks* (n147)
[149] BALLAN Barbara and CZARNEZKI Jason J., *Disclosure, Greenwashing, and the Future of ESG Litigation*, 81 Wash & Lee L. Rev. 545, p.550
[150] LOI n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets
[151] Decrees No. 2022-538 and 2022-539 of 13 April 2022
[152] BALLAN Barbara & CZARNEZKI Jason J., ARTICLE: Disclosure, Greenwashing, and the Future of ESG Litigation (n149), p. 564

Contrarily to France and the United-States, the United Kingdom, has only "fragmented" and "not yet 'mandatory'" regulations[153]. However, Digital Markets, Competition and Consumers Act 2024, which came into force on 1 January 2025, might change this. Additionally, the UK's Competition and Markets Authority ("CMA") and the Advertising Standards Authority ("ASA") have already intervened to regulate the market.

§ 83 – To what extend the luxury industry is exposed to greenwashing? There are not many examples of luxury companies involved in greenwashing across France, the United-Kingdom and the United-States. One thing could explain this lack of examples: Greenwashing is a discrete term. This concept is primarily based on consumer's understanding and perception of the company's statement. This psychological aspect of greenwashing makes its identification and prosecution challenging.

Another element must be taken into account: how can a court claim that a luxury company intentionally lied and set up a completely fictitious communication? Do courts rely on specific factors or on a discreet interpretation?

In the United-States first, US District Court of Eastern District of Missouri denied the plaintiff's claims[154], stating that there was no sufficient evidence of greenwashing. H&*M* was accused to use greenwashing in order to promote its brand-new collection: "Conscious". The plaintiffs argued that H&M misled consumers into thinking that the clothes line was "sustainable" and "environmentally friendly"[155]. However, the Court ruled that no reasonable consumer would see the collection as it and that H&M did not state "that its products are 'sustainable' or even 'more sustainable' than its competitors"[156]. After carefully analysing H&M's collection, the Court also stated that the brand disclosed the exact composition of each product. Accordingly, the judge did not use any specific factors in making his decision. Instead, the Court relied on customers' perception of the brand's strategic choices and thereby opting for a case-by-case interpretation. Although this case is not about a luxury company's wrongdoing, it still shows

[153] WHITE&CASE, *Navigating the Evolving Era of Greenwashing Regulations in the Fashion Industry*, 2024, URL: https://www.whitecase.com/insight-alert/navigating-evolving-era-greenwashing-regulations-fashion-industry
[154] *Abraham Lizama, et al., v. H&M Hennes & Mauritz LP*, 4:22-cv-01170 (E.D. Mo.)
[155] THE FASHION LAW, *H&M Beats Lawsuit Accusing it of Greenwashing its Fast Fashion Wares*, The Fashion Law, May 16, 2023, URL: https://www.thefashionlaw.com/hm-escapes-lawsuit-accusing-it-of-greenwashing-its-fast-fashion-wares/
[156] *Ibidem*

that convicting fashion companies for greenwashing remains challenging and uncertain as no exact criteria exist yet in the US. Therefore, a better guidance from the authorities would make greenwashing claims easier.

This legal vacuum is also found in France where courts are struggling to convict luxury or fashion brands for greenwashing. Recently, the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) filed a complaint against *Lululemon* (sportswear brand) for using greenwashing. While no decision has been taken yet, experts are waiting for the outcome as it will certainly help to understand greenwashing in fashion a little more. Finally, as no luxury company has ever been convicted for greenwashing, it appears interesting to wonder whether the court decision on Lululemon's alleged greenwashing will also apply to luxury companies.

In the United-Kingdom, to address this uncertainty, "the CMA has created a guide to help fashion companies avoid making unsupportable claims".[157] Future litigation will reveal whether these guidelines will also apply to luxury brands.

III) <u>The uncertain impact of poor environmental management on potential initial public offerings conducted by luxury houses</u>

§ 84 – Generalities. The aim is to explore the potential impact of non-compliance with environmental regulations on the stock market listing of large groups. In the United States, some companies have already faced restrictions on going public due to environmental reasons.

§ 85 – Litigations involving luxury fashion companies in the United-States. First of all, in the United-States, some companies with poor environmental management have been facing obstacles when trying to go public and therefore trading on the US market change. While, there is no example of luxury fashion companies yet, fashion companies more broadly encountered increased scrutiny and delays.

[157] HALLIDAY Sandra, *UK's CMA issues greenwashing guide for fashion sector*, Fashion Network, 2024, URL https://ww.fashionnetwork.com/news/Uk-s-cma-issues-greenwashing-guide-for-fashion-sector,1665276.html

This is for example the case of Chinese Brand *Shein* "which is facing pushback over its plans to list on a financial exchange in the U.S.".[158] Originally, a meat-producing company was flagged by New York State Attorney General Letitia James for engaging in greenwashing to mislead consumers. As a result, the State of New York filed a lawsuit against meat giant JBS. In a ruling dated 10 January 2025, the New York Supreme Court sanctioned JBS for greenwashing and, therefore, for failing to comply with ESG regulations[159]. While this decision does not directly concern the stock market listing of a luxury company, it nevertheless plays a crucial role in that context. Indeed, the court's ruling led to much stricter regulatory scrutiny of JBS's IPO (Initial public offering) application by the SEC. Non-compliance with ESG regulations could therefore indirectly complicate, or even prevent a company's IPO.

Some commentators argue that this decision could be extended to the fashion and luxury industries due to their poor ESG standards compliance. This would consequently negatively impact the luxury sector, who generally relies on IPOs to raise money. While no official ruling has been yet issued concerning the luxury industry, the fast-fashion company *Shein* (not a luxury brand) is currently facing major obstacles in its attempt to go public in the United States.

§ 86 – Litigations involving luxury fashion companies in France and the United-Kingdom. First of all, in the United Kingdom, no such case as the American one has been identified. However, the Financial Conduct Authority is closely monitoring the case of *Shein*. Indeed, the clothing company plans to go public in the UK. However, allegations of forced labour involving the Uyghur community and, more broadly, the company's failure to comply with ESG standards could potentially block its stock market listing[160]. It is worth questioning whether a potential ruling could specifically target the luxury sector rather than the fashion industry in general.

In France, unlike in the United States and the United Kingdom, no potential ban on stock market listings or actual decision has been identified in cases where a luxury company fails to comply with RSE standards. There is currently no provision that prohibits making a public offering on the grounds of non-compliance with socio-environmental laws. Therefore, neither the courts

[158] THE FASHION LAW, *Got Questionable Climate Credentials? That Might Impact Your IPO*, The Fashion Law, March 13, 2024, URL: https://www.thefashionlaw.com/got-questionable-climate-credentials-that-might-impact-your-ipo/
[159] *New York State v. JBS USA Food Co., et al.,* 450682/2024 (N.Y. Sup. Ct.).
[160] REID Helen, *UK regulator's Shein IPO decision slowed by challenge from Uyghur group,* Reuters, December 12, 2024

nor the French legislature have yet ruled on this issue. However, the growing demands in terms of RSE, combined with influence from the United States, may eventually compel the French lawmaker to act.

That said, it is worth waiting to see whether the American ruling and the Shein case are isolated incidents. If they are, non-compliance with ESG standards will have no real impact on the public listing of luxury companies and groups. Conversely, if a broader trend emerges, such companies will have a vested interest in complying with the regulations in order to avoid seeing their listing plans denied.

- **Section 2: Legal and economic strategies to combat counterfeiting and preserve reputation in the luxury industry**

§ 87 – Combat counterfeiting and maintaining high standards in the luxury industry. First of all, counterfeiting is a central concern in the luxury sector. Indeed, many luxury companies complain about the growing number of counterfeit products. According to the International Chamber of Commerce, counterfeiting resulted in losses of more than $200 billion in 1996 for haute couture houses.[161] However, counterfeiting may harm luxury companies' reputation.

§ 88 – Legal and strategy instruments to avoid counterfeiting. Counterfeiting is prohibited and punished across France, the United-Kingdom and the United-States by laws and treaties. However, while this aspect of the law will not be treated here, it appears important to wonder whether luxury companies can arm themselves against this major issue. In particular, it is worth analysing the legal mechanisms available to these companies to take action against counterfeiters or avoid being targeted by it.

First of all, in the United States, a landmark case was issued regarding the company *"The RealReal"*. To understand what follows, it is important to recall what The RealReal is. This company operates in the resale of luxury goods. However, it has been called out for its lack of rigor in verifying the authenticity of the items it sells. Although the company acts merely as a reseller and not as a direct victim of counterfeiting, it is worth considering whether this decision

[161] NIA A. and ZAICHKOWSKY J.L, *Do counterfeits devalue the ownership of luxury brands?,* Journal Of Product & Brand Management, VOL. 9 NO. 7 2000, pp. 485

could apply to fashion houses that are negligent in this area. Indeed, it is relevant to ask whether the shareholders of a luxury house could sue the company for failing to act, for not being aware that its products were being counterfeited, or for failing to protect the company's reputation. Also, what mechanisms could the company implement to prevent any litigations?

In the *RealReal case*, a derivative action brought by shareholders against the directors. They are accused of having breached their fiduciary duties, including poor authentication practices, inadequate board oversight, and mishandling of whistle-blower concerns[162]. In this case, The RealReal agreed to settle with the shareholders: "The RealReal will pay $500,000 and make reforms to its corporate governance, including in connection with its authentication practices, whistle-blower policy, and oversight policy for retail sales practices and customer relationships".[163] This settlement was subsequently approved by Judge Leonard Stark of the District of Delaware in a decision dated 11 February 2022[164]. In the United States, directors are required to act with respect to their fiduciary duties (duty of care or duty of loyalty). As such, when "The RealReal" made "a series of materially false and misleading statements and omissions regarding [its] authentication processes" and failed "to maintain internal controls," [165] the directors breached their fiduciary duties. In this case, since they were aware of the company's lack of rigour and intentionally committed misrepresentation, directors acted in bad faith.

§ 89 – The Real-Real case impact on luxury companies. This case clearly demonstrates that, in the United-States, through the mechanism of "derivative suit", shareholders are able to ensure the preservation of the company's reputation and that the products it sells are not counterfeit. This reasoning could be extended to luxury houses in general (not just luxury goods resellers), allowing shareholders to safeguard the brand image. In such a case, shareholders would not sue the company for failing to properly verify the authenticity of the products it sells (like in the RealReal case), but rather for failing to take appropriate action against a third-party marketing counterfeit or more generally for taking decisions that harm the company's reputation. The

[162] THE FASHION LAW, *Court Approves $500K, Governance Reforms Settlement in The RealReal Stockholder Suit*, The Fashion Law, February 15, 2022, URL: https://www.thefashionlaw.com/court-approves-500k-governance-reforms-settlement-in-the-realreal-suit/
[163] *Ibidem*
[164] *Iwona Grzelak v. Julie Wainwright, et al*, 1:20-cv-01212 (D. Del.)
[165] THE FASHION LAW, *Court Approves $500K, Governance Reforms Settlement in The RealReal Stockholder Suit* (n162)

company may also choose to strengthen the powers of the board of directors in this area and to establish specialised committees dedicated to the issue.

§ 90 – Legal and strategy instruments to avoid counterfeiting in France and the United-Kingdom. To begin with, no ruling directly related to the reputation of a luxury house has been made in France or the United Kingdom. However, it is worth considering whether mechanisms similar to those implemented in the United States could be adopted in these two jurisdictions.

France allows shareholders to hold a company director personally liable in three situations: if they breach laws and regulations, violate the company's articles of association, or commit a management fault. However, a director's failure to uphold a duty of loyalty towards any shareholder[166] or the company[167] itself may also give rise to liability. It is therefore conceivable that shareholders could bring an *ut universi* or *ut singuli* action to hold a director accountable if they were aware of conduct damaging to the company's reputation, or for a failure to act against counterfeiting. However, French courts remain more reserved than their American or British counterparts. Lawmaker intervention would therefore be more appropriate.

Then, in the United Kingdom, the Companies Act 2006 also allows shareholders to bring a derivative claim against a director who has committed a wrongdoing[168]. Shareholders of a luxury firm could sue a director who fails to take necessary measures to preserve the company's reputation. Indeed, Section 172 of the Companies Act[169] emphasises that a director has a duty to act in the best interests of the company. Section 174 further provides that "a director of a company must exercise reasonable care, skill and diligence."[170]

However, compared to the United-States, both in France and in the United Kingdom, it currently appears difficult under existing law to hold a director liable for failing to act against a third party infringing the company's intellectual property rights. Contrarily, a claim based on damage to the luxury brand's reputation may be more easily pursued.

[166] Cass. com., 27 fév. 1996, n° 94-11.241, Arrêt Vilgrain
[167] Cass. com., 24 fév 1998, n° 96-12.638 Arrêt Kopcio
[168] DIGNAM Alan and LOWRY John, *Company law* (n45), p.174
[169] Companies Act 2006, s 172
[170] Companies Act 2006, s 174

- **Section 3: Between going public and family control: financing strategies in the luxury industry**

§ 91 – Going public or family control? Most luxury companies are very old and strive to preserve their original heritage, aiming to keep the business family-owned. However, these companies may be exposed to external events that could disrupt their stability (e.g., going public). Given the desire of some luxury companies to stay family-owned, directors often hesitate between going public to raise capital and keeping the business private to preserve control.

§ 92 – Going public or family control? The solution. The solution to this dilemma lies in the law. In France, luxury companies can opt for the *société en commandite par actions*, which allows only the shares of the commanditaire to be listed on the stock exchange. As a result, while the company may be publicly traded, there is no risk of losing control. Indeed, as noted above **(See Supra § 15)**, foreign investors would not be able to access the company's management. *Hermès* opted for this legal strategy and managed to keep the business family-owned.

The UK and US equivalent of the French "*société en commandite*" par actions could be the partnership structure. However, partnerships cannot be publicly traded. Therefore, opting for this kind of entity does not resolve the issue for companies seeking access to stock exchange. *Chanel Limited* is an example of a company incorporated in the United Kingdom that is not publicly traded and has not adopted partnership status. One solution for such companies could be the use of a SPAC, which allows them to raise capital without the risk of losing control. This mechanism consists in creating a "special purpose acquisition company"[171] to raise money without risking anything. The new created company then mergers with the existing company.

Finally, luxury companies tend to use the group structuring strategy and other legal tools very often. However, the concept of mergers and acquisitions in this sector also needs to be studied.

[171] YOUNG Julie, *Special Purpose Acquisition Company (SPAC) Explained: Examples and Risks,* Investopedia, 2025, URL: https://www.investopedia.com/terms/s/spac.asp

TITLE 3) The necessary use of mergers and acquisitions in the luxury industry: France, the United Kingdom and the United States

Mergers and acquisitions are key strategic tools for luxury fashion companies, especially in France, the UK, and the US (Chapter 1). Yet, they also raise complex challenges, notably in defending against hostile takeovers (Chapter 2).

CHAPTER 1) The practice of mergers and acquisitions and the luxury industry: a comparative study between France, the United Kingdom and the United States

While mergers and acquisitions are a common strategy in the luxury industry (Section 1), defining the relevant market for Haute couture houses reveals key differences between France, the UK, and the US, highlighting emerging limits (Section 2).

- **Section 1: Legal framework of a recurrent practice of mergers and acquisitions : generalities and absence of specific rules to the luxury industry**

While understanding the rules governing mergers and acquisitions (M&A) in France, the UK, and the US is essential (I), it is equally important to explore the specific examples and particularities of M&A transactions within the luxury industry (II).

I) The regulation of mergers and acquisitions in France, the United Kingdom and the United States

§ 93 – Importance of mergers and acquisitions within the luxury industry. First of all, mergers and acquisitions are key strategic tools. While the previous section focused on the legal structure of luxury groups, this section will examine the actual process of mergers and acquisitions, which often leads to their formation. Mergers and acquisitions are increasingly common within the luxury industry and have a significant impact on the market. CABIGIOSU explains that “Luxury brand acquisitions began gaining recognition in the 1980s, allowing

brands to maintain their unique identities while accessing financial resources for global expansion in so-called conglomerates." [172]

§ 94 – The French jurisdiction: Generalities. First of all, France distinguishes between mergers and acquisitions. A merger ("*fusion"* in French) brings together two legal entities into one, while an acquisition allows one company to take control of another (both original entities survive). Acquisition remains the dominant strategy among luxury groups as it allows luxury companies to preserve their identity while joining a conglomerate. Then, although mergers are less frequent, they often lead to the creation of major luxury groups.

§ 95 – The French jurisdiction: *Fusions and acquisitions* First, Article L.236-1 of the French Commercial Code[173] distinguishes between two types of mergers: merger by absorption and merger through the creation of a new company. The latter closely resembles the American concept of a triangular merger, wherein "two companies unite to give rise to a third."[174] In the case of *LVMH*, some confusion persists. Indeed, numerous practitioners refer to the transaction between *Louis Vuitton* and *Moët Hennessy* as a merger, although this is not legally accurate. As R. RAFFRAY explains, a true merger legally entails the dissolution of the absorbed company, with its assets transferred in full to the absorbing entity.[175] In the LVMH transaction, both Louis Vuitton and Moët Hennessy continued to exist as separate legal entities. Thus, from a strictly legal perspective, it would be incorrect to characterise this operation as a merger.

Moving on, only Articles L.233-1 et seq.[176] of the French Commercial Code regulate acquisitions. As explained above **(See Supra §41),** these provisions establish the legal framework governing control relationships between companies. The notion of "acquisition" is therefore not subject to extensive regulation. Luxury companies must rely on the general legal framework governing acquisitions and draw inspiration from related areas of law to address issues specific to the luxury sector.

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[172] STUBELJ Uršula, *From Acquisition to Integration: Exploring Customer Responses to Acquisitions in the Fashion industry*, Thesis, 2024, p7
[173] Art. L. 236-1 et s. C. com.
[174] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p905
[175] RAFFRAY R., *La transmission universelle du patrimoine des personnes morales*, Dalloz, coll « Nouvelle Bibl. de thèses », préf. Fl. Deboissy, 2011.
[176] C. com., art. L. 233-1 s. et R. 233-1 s.

§ 96 – The British jurisdiction. As in France, the United-Kingdom distinguishes between different types of M&A. (e.g., private and public merger or acquisitions). Private mergers and acquisitions (M&As) are conducted by non-publicly traded companies and, like in France, are not subject to heavy regulations[177]. On the other hand, public M&As involve publicly traded companies. Consequently, the legislation varies depending on the form of merger. However, as in France, after a merger, the target company ceases to exist. This could be unfortunate within the context of the luxury industry in which companies seek to maintain their identity. As a result, UK mergers tend to be ill-suited to this sector.

Then, it is important to note that, unlike in the United-States, the British jurisdiction clearly distinguishes between mergers and takeovers. Here, the "takeover" in question can be considered the British equivalent of the French acquisition. Moreover, the law applied to takeovers depends on the target company form:

1. The UK Takeover Code[178] or (City Code on Takeovers and Mergers) applies when a public company is targeted
2. On the other hand, only general company law (Companies Act 2006) applies when the target is a private company

Moving on, the City Code provides basic rules governing listed companies' takeovers. It first emphases that "all shareholders must be given the same information"[179]. It also stresses that "actions during the course of an offer by the offeree company which might frustrate the offer are generally prohibited".[180] These types of takeovers are therefore heavily regulated and controlled.

Finally, while some forms of M&As are suitable to the luxury industry, others appear ill-suited to the luxury business. For example, takeovers of listed companies may be overly regulated and lack of flexibility to appeal luxury firms.

However, as previously noted **(See Supra § 20)**, most British luxury houses are Private companies and therefore not listed on a stock exchange. Additionally, as stated above, in the luxury industry, private companies are more likely to be the target rather than the purchaser.

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[177] WBS, *Mergers and Acquisitions: A Legal Guide*, Wilson Browne Solicitors, URL: https://www.wilsonbrowne.co.uk/guides/a-guide-to-mergers-and-acquisitions/

[178] Takeover Code, 13th ed.

[179] DIGNAM Alan and LOWRY John, *Company law* (n45), p.68

[180] DIGNAM Alan and LOWRY John, *Company law* (n45), p.69

Given all of this, it appears natural to assume that, in the United-Kingdom, in the context of the luxury sector, takeovers will generally be regulated by the general legal framework (companies act…) rather than stricter regulations. This could therefore improve their ability to trade and expand.

§ 97 – The American jurisdiction: Generalities. First of all, compared to France, in the United-States, mergers and acquisitions are highly regulated. It exists indeed four basic main negotiated business combinations:

- Statutory merger or consolidation
- Triangular merger
- Sale of assets
- Share exchange

Mergers and acquisitions can also be completed by using the "tender offer" technique which is not subject to negotiations with the board of directors. This mechanism is similar to the french OPA (offre publique d'achat). It is moreover highly used by luxury companies since tender offers are easily implementable: no need to obtain authorisation from the board to take over the company. Finally, while all American States have their own regulations, it is worth it focusing on Delaware law and MBCA principles.

In general, MBCA §6.21 (f)[181] explains that no matter what form of M&A is completed, shareholders from the acquiring company will have to approve it if the company's voting power is increased by more than 20% from issuance of shares. On the other hands, Delaware General Corporation Law (DGCL §251(b)[182]) states that shareholders from each entity get to vote except for some cases.

§ 98 – The American jurisdiction: The most suitable type of M&A in the luxury industry. The triangular merger seems to be the most suitable type of M&A in the context of the luxury industry since it compels the target company to merger into a subsidiary created by the buyer[183]. The targeted company legally ceases to exist but gets to keep its identity as it mergers with a NewCo. This independence from the parent company is highly valuable in the context of a Haute Couture house as luxury companies have their own background and identity. The

[181] MBCA §6.21 (f)
[182] DGCL §251(b)
[183] DGCL § 251

triangular merger also permits the targeted company to keep its contracts, licences, and trademarks, really important for a luxury firm.

Jeffrey D. BAUMAN explains that in the context of a triangular merger, the subsidiary's limited liability shields purchasers from target's liabilities[184]. This is quite valuable within the context of luxury companies since this technique shields the purchaser company from tarnishing the group's image or reputation. As a result, any lawsuit involving the targeted company will not affect the group, and consumers will therefore rarely associate it with the conglomerate's reputation.

On the other hands, in a sale of assets, the purchaser company negotiates with the target company to purchase all of target's assets, employees and business. Target then dissolves, distributing cash or purchaser's shares to target's shareholders.[185] In this context, it seems like this type of transaction would not be suitable for luxury companies as they typically hold numerous contracts and own a large range of trademark rights, copyrights, and other intellectual property. Transferring these assets individually would be overly complex and impractical.

II) Examples and specificities of mergers and acquisitions in the luxury industry in France, the United Kingdom and the United States

§ 99 – Case Study: Litigations in the Luxury Industry. In France, *LVMH* recently acquired *Tiffany & Co*., but the transaction was initially marked by tension and legal disputes. This case demonstrates how even seemingly friendly mergers and acquisitions in the luxury sector can evolve into contentious situations. To fully understand the outcome, it is important to recall the background of the transaction. This case highlights the importance of M&A negotiations, as their interpretation can give rise to litigation. It is particularly relevant to our analysis, as it involves a *French-American dispute* and can be compared to similar cases in the UK.

In this case, on the 24 November 2019, LVMH (French group) agreed to acquire Tiffany and Co. for $16.2 billion ($135/share). Both boards approved the deal, making it the largest transaction never signed within the luxury sector. However, the COVID-19 pandemic caused

[184] BAUMAN Jeffrey, STEVENSON Russell & RHEE Robert, *Business Organizations Law and Policy*, West, 10th ed., 2022, p632
[185] DGCL §271

economic losses to the target company, Tiffany & Co. LVMH argued that the group faced a Material Adverse Change (MAC) and therefore has the right to cancel the deal. The group relied on the Material Adverse Change clause, which permits the buyer to drop out in case of an outside control event. Tiffany eventually sued LVMH in Delaware Chancery Court to enforce the agreement. In October 2020, the two entities settled and agreed to reduce the sale's price from $16.2 billion to $15.8 billion. The court then approved the settlement in question, indirectly rejecting LVMH's argument.

This case proves that Delaware is often reluctant to the idea of terminating merger agreements. Delaware Courts usually strictly interpret Material Adverse Change clauses, trying not to interfere with the companies' business. This suggests that in the US, Material Adverse Change (MAC) clauses are interpreted very narrowly, even in cases involving a foreign government's interference. Here the French government attempted to cancel the deal by asking LVMH to pause it[186]. On the other hand, French courts are generally more inclined to terminate merger agreements. However, no formal ruling has ever been issued in the context of a luxury sector acquisition. We could assume that French courts would be likely adopt a stricter approach when reviewing mergers involving two luxury entities, given the significant economic stakes. As a result, this conflict shows that negotiations in luxury sector mergers are particularly important, as a wrong interpretation could drastically change the outcome of the case. However, as the regulatory framework for such cases remains unclear in France and in the US, it is essential for the parties involved to carefully negotiate and draft the agreement clauses.

In the *United-Kingdom*, according to Martha SPEED and Jemma DEENEY, trainee solicitors at Brodies LLP, Material Adverse Change (MAC) clauses are also really narrowly interpreted. They argue that "a high threshold would have to be met in order to successfully argue that a pandemic should be considered as a MAC"[187]. UK Courts also take into account the parties' knowledge by the time the agreement was concluded.

Finally, mergers and acquisitions are widely used in the luxury sector in France, the United Kingdom, and the United States. While litigations may occur, most of these transactions do not result in significant lawsuit.

[186] SPEED Martha, *Clash of the (Luxury Goods) Titans: A UK Perspective on Tiffany & Co. v. LVMH*, The Fashion Law, December 18, 2020
[187] *Ibidem*

§ 100 – The necessity to protect the industry from malicious bidders. Although mergers and acquisitions are regulated by general frameworks across the three jurisdictions, certain specificities related to the luxury industry still need to be addressed. One major concern is the sector's exposure to malicious investors. It is therefore important to examine whether France, the United Kingdom, and the United States are legally equipped to mitigate these risks.

First of all, Article L151-2 of the French Monetary and Financial Code gives the Government the right to deny certain business operations in order to ensure the defence of national interests. The interests protected by this article are, for instance, linked to critical technologies. As a result, the luxury industry is not considered a sector of national interest in France. This is unfortunate, given the substantial role that luxury plays in the French economy. France should ensure this industry is effectively protected from foreign bidders. Things might change since a petition has recently been drafted by French citizens to protect French luxury estate from foreign investors. Additionally, many French lawyers as Sandrine BENAROYA, counsel at Fairway, call for a much stricter protection of French businesses via Article L151-2.[188]

On the other hand, the United Kingdom and the United States opted for a broader regulation. First, the United-Kingdom, "the National Security and Investment Act 2021" sets a list of 17 strategic sectors subject to government authorisation in case of foreign mergers and acquisitions offers. In the United-States, Committee on Foreign Investment in the United States (CFIUS) has the mission to control foreign investments. None of these two jurisdictions passed specific regulations to protect the luxury industry. However, the UK and the US appear to be more flexible and thereby more likely to prevent a foreign bidder from maliciously buying a luxury company.

- **<u>Section 2: The emerging limits of a repeated practice of mergers and acquisitions in the luxury industry</u>**

While defining the market in the luxury industry is central (I), uncertainties persist (II).

[188] BENAROYA Sandrine, *Fusions/Acquisitions : le contrôle des investissements étrangers en France, une étape à ne pas sous-estimer*, La Tribune, 2024

I) Defining the market in the luxury industry

§ 101 – The importance of defining the market. First of all, defining the market is key in all economic sectors since monopoly is evenly forbidden across France, the United-Kingdom and the United-States. Indeed, "the main purpose when defining a market is to find the competitive constraints the company in question meets".[189] This statement shows that defining the market is the basis of competition law and this holds true for all three jurisdictions. This section will however focus on defining the luxury market.

II) Overview of the legislation in France, the United Kingdom and the United States

§ 102 – The market definition and luxury companies in the United-States. First of all, in the United States, the Federal Trade Commission (FTC) is responsible for ensuring that no monopoly is formed by a company or a group of companies. The main act used to regulate the market is the Shareman Antitrust Act (1990).

Regarding luxury fashion companies, in the United-States, the sector benefited from a large definition of the market until recently.

§ 103 – Luxury market in the United-States: *Federal Trade Commission v. Tapestry, Inc.,* (SDNY[190]). The new definition of the luxury market established by the United States District Court for the Southern District of New York could clearly restrict the practice of mergers within the luxury industry.

In *Federal Trade Commission v. Tapestry, Inc*.[191], the TFC blocked a $8.5 billion merger between luxury groups Tapestry and Capri potentially uniting *Michael Kors, Versace, Coach, and Kate Spade*[192]. The FTC argued that allowing this merger would considerably reduce the competition within the luxury market.

[189] MELIN Hanne, *Consequences of market definition under competition analysis - the luxury fashion market*, 2002, Thesis p17
[190] SDNY for United States District Court for the Southern District of New York
[191] *Federal Trade Commission v. Tapestry, Inc.,* 1:24-cv-03109 (SDNY)
[192] WEST Aaron, *What the FTC's Case Against Tapestry Means for Future Mergers*, The Fashion Law, October 18, 2024

To examine the merger, instead of considering the whole luxury market, the Federal Trade Commission relied on a narrower perimeter. It indeed limited the scope of the focus to one segment: the "accessible luxury" market. It consequently now clearly distinguishes between mass market, accessible luxury and high-end luxury. However, these new criteria make the definition of the fashion market so difficult that it could considerably negatively impact the market. The Court issued a preliminary injunction blocking the $8.5 billion merger between Tapestry and Capri Holdings on October 24, 2024. However, the case did not proceed to a final court decision since the two entities terminated the merger agreement before. According to Aaron WEST, this decision in favour of the FTC has "a chilling effect on future mergers and acquisitions in the fashion sector."[193]

§ 104 – The market definition and luxury companies in France and the United-Kingdom.
In France and in the United-Kingdom, the competition authorities do not use the same analysis method as the one used by the FTC in the United States. Indeed, the two jurisdictions opted for a more flexible and economic approach.

First of all, in France, the "autorité de la concurrence" and the European Commission (if competent) do not automatically review mergers and acquisitions. Furthermore, regarding the luxury market, both the "autorité de la concurrence" [194] and the European Commission[195] define it in broad terms. They consider that a merger or acquisition falls within the luxury market as long as it involves luxury and high-quality products. Unlike in the United States, this broad definition allows major French luxury groups to grow without acting unlawfully.

In the United Kingdom, the approach is very similar to the French one due to its former membership of the European Union. The Competition and Markets Authority (CMA) has also adopted a broad definition of the luxury market, even if since Brexit, it has made it possible to take submarkets into account.

[193] WEST Aaron, *What the FTC's Case Against Tapestry Means for Future Mergers* (n192)
[194] Decision n° 10-DCC-139 of 27 October 2010 relating to the acquisition of joint control of Maje, Sandro, Claudie Pierlot and HF Biousse by L Capital and Florac; Decision No. 05-D-06 of 23 February 2005 relating to a referral by Studio 26 against Rossimoda, Marc Jacob's International, LVHM Fashion Group and LVMH Fashion Group France.
[195] COMP/M.1780 LVHM / Prada / Fendi du 25 mai 2000 ; IV/M.1534, Pinault-Printemps-Redoute / Gucci du 22 juillet 1999

As a result, the American perspective on the luxury market differs from the French and UK ones. Nevertheless, *Federal Trade Commission v. Tapestry, Inc*. may still have an impact on France and the UK, as many of their luxury companies engage in mergers or acquisitions within the United-States. This argument is indeed supported by Wyatt FORE, partner at Shinder Cantor Lerner LLP.[196]

Finally, although mergers and acquisitions are commonly used by the giants of the luxury industry, this practice exposes target companies to major risks.

CHAPTER 2) The risks of mergers and acquisitions in the Luxury Industry : A Comparative Study between France, the United Kingdom and the United States

Luxury companies facing hostile mergers and acquisitions must rely on general defence mechanisms, as no specific regime applies to the industry (Section 1). M&A transactions may also raise critical concerns about the protection of trade secrets (Section 2).

- **Section 1: Means of defence against hostile mergers and acquisitions: no specific regime applied to the luxury industry**

While defences against hostile takeovers play a key role in safeguarding luxury firms' identity and control (I), France, the UK and the US have divergent regulations (II).

I) Defences against hostile takeovers in the luxury industry

§ 105 – Hostile takeovers across France, the United-Kingdom and the United-States. Mergers and acquisitions can sometimes be hostile: the bidder seeks to gain control of the target company without the board's consent.

Sometimes, directors of the target seek to impede the merger in order to preserve their own positions within the company. This risk is particularly present in the context of the luxury industry, where directors might justify their actions by invoking exclusivity and the protection of brand reputation, even when no real danger has been identified. Given this, it is essential to

[196] WEST Aaron, *What the FTC's Case Against Tapestry Means for Future Mergers* (n192)

consider whether France, the United Kingdom, and the United States have adopted specific legal frameworks or decisions to hostile takeovers in the luxury sector.

II) The necessary comparative analysis of French, British and American legislation

§ 106 – Hostile takeovers in the United-States. First of all, in the United-States, there are two types of hostile takeovers: proxy battles and tender offers[197].

Regarding the *proxy battle*, the investor attempts to take control of the board and tries to convince shareholders to think like him. They will therefore vote to replace the board and elect the outsider bidder instead.

Alternatively, the bidder may launch a *tender offer*, proposing to buy shares directly from shareholders, usually at a premium, to build a controlling stake. In some cases, a hostile bidder may greenmail[198] the board: demanding payment to walk away (the threat of launching a takeover).

§ 108 – Judicial review of takeover defences and luxury industry in the United-States. First, the use of defensive measures by luxury firms can be controversial and therefore subject to a specific interpretation from the courts.

Generally, targeted companies may use two main methods to protect themselves from bidders: poison pills (or "rights plan") and staggered board. First of all, poison pills tend to make a takeover more expensive for the buyer since by using them, the company issues more shares at a significant discounted price.[199] Moving on, adopting a staggered board structure helps the company delay the full replacement of the board by the bidders. Indeed, it makes it longer for the buyer to elect new directors since only a third of them are up for election each year.

Moreover, these defensive measures, commonly used by luxury companies, are often subject to judicial review. While few States chose not to opt for Delaware law, this State remains highly

[197] BAUMAN Jeffrey, STEVENSON Russell & RHEE Robert, *Business Organizations Law and Policy* (n184) p910-914
[198] *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964) on Greenmail regulations
[199] BAUMAN Jeffrey, STEVENSON Russell & RHEE Robert, *Business Organizations Law and Policy* (n184), p911

influential in the field and deals with the most important American luxury companies. It is therefore worth it analysing the legality of takeover defences from a Delaware point of view.

First of all, in 1964, in *Cheff v. Mathes*, the Supreme court of Delaware stated that directors benefit from the business judgement rule standard of review[200] only if they show evidence of a "proper business purpose"[201]. Then, in 1985, in *Unocal Corp. v. Mesa Petroleum Co*[202], the Supreme court of Delaware established that in case of a potential conflict of interest, directors of the board will not automatically benefit from the business judgement rule. This potential conflict of interest is called the "omnipresent sector" means that the current directors have interest to block the merger or acquisition. In this case, the court would instead raise the standard to intermediate scrutiny. Thus, directors will have to show evidence of a legitimate threat, a danger to the corporation policy and the effectiveness of the defensive measure. The Court then explained, in *Moran v. Household Int'l*[203], that directors are entitled to launch takeover defences even if there is only a hypothetical threat. In this case, the Supreme court of Delaware stresses that business judgement rule would apply.

As a result, in the United-States, the notion of threat appears quite important. It is moreover defined by *Unocal Corp. v. Mesa Petroleum Co.* The Court listed the factors used to determine whether or not there is a "legitimate threat": the "inadequacy of price", "the nature and timing of offer" or the "risk of nonconsummation"[204], in other words, the chance the transaction will not happen. However, when applied to the luxury industry, these factors may appear too broad and not specific enough to the sector. It is therefore important to analyse whether American courts addressed this issue and ruled on the matter. As a result, given that luxury companies tend to protect their exclusivity and their brand identity, can a threat be identified when the target claims brand dilution or loss of control over identity? While no actual courts have actually directly answered this question, some cases remain relevant.

First of all, although only few cases dealt with the notion of threat in the luxury fashion industry, American courts sometimes had to deal with this term. In a trademark case, *Louis Vuitton*

[200] *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984): Directors of the board get to do whatever they want if independent and disinterested.
[201] See *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964)
[202] See *Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946
[203] See *Moran v. Household Int'l*, 500 A.2d 1346
[204] See *Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946

Malletier S.A. v. Haute Diggity Dog LLC[205], the US Court of Appeals for the Fourth Circuit acknowledged that luxury brands need to be protected from dilution which can be lethal for the business.

Then, in a more M&A centred case, the Supreme court of Delaware stated that in order to protect the business' long-term vision and brand identity, when a company is for sale, directors shall maximise shareholder value. Indeed, in *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc*[206]*,* involving a fashion makeup company, the Court established that directors shall prioritise achieving the highest value for shareholders over accepting a potentially harmful short-term bid. This demonstrates that courts are willing to protect a company's identity and overall well-being. Although this case does not directly address the issue of a 'threat,' we can still argue that the Court may, in other contexts, be open to recognising the risk of harm to a brand's identity as a form of threat. This could therefore benefit luxury companies. With all that said, it could be interesting for the American lawmakers to draft a definition of the term "threat" specifically tailored to the luxury company.

§ 108 – Hostile takeovers and the luxury industry in France. In France, as in the United States, certain takeover bids can be hostile. In such cases, the acquirer chooses to "launch a hostile offer without the approval of the target company's management." [207] French luxury firms are particularly vulnerable to this type of approach, frequently employed by the global luxury giant *LVMH*. Bernard Arnault, for instance, has been described as having "built the LVMH group through hostile takeovers, with a keen sense of power dynamics." [208] It is therefore important to consider the general regime governing hostile takeovers.

§ 109 – Judicial review of takeover defences and luxury industry in France. First of all, in France, companies can defend themselves against hostile takeover bids by adopting preventive or defensive measures during the course of the offer[209]. With regard to preventive measures,

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[205] *Louis Vuitton Malletier S.A. v. Haute Diggity Dog*, LLC, 507 F.3d 252
[206] *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc*., 506 A.2d 173
[207] AUSSILLOUX, Vincent, and BESSIERE Véronique. *"Offres Publiques d'achat. Dissuasion Ou Prix Minimal, Offre Hostile Ou Négociée."* Revue Économique, vol. 49, no. 3, 1998, pp. 777–84. JSTOR https://www.jstor.org/stable/3502808
[208] BRINI Zied, *LVMH's acquisition of Tiffany: information warfare as a negotiating tactic*, 2021 URL: https://www.ege.fr/infoguerre/acquisition-de-tiffany-par-lvmh-guerre-de-linformation-comme-tactique-de-negociation
[209] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p849

companies may opt for "cross-shareholding"[210]: this occurs when "Company A controls Company B, which controls Company C, which in turn controls Company A." [211] In such a case, none of the companies directly holds its own shares. This method of defence remains rarely used by luxury companies due to its complexity and its close association with corporate group structures.

Target companies may also seek to cap the voting rights held by a shareholder in order to avoid "proxy battles." Article L.225-125 of the French Commercial Code[212] allows target companies, through their articles of association, to prevent "hostile takeovers." [213] French legislation also permits companies, in anticipation of a hostile bid, to issue preference shares with or without voting rights. Article L.228-11 of the French Commercial Code indeed allows companies to categorise the issued shares and assign them specific rights accordingly. Finally, during the course of an offer, target companies may authorise their board of directors "to take any decision "the implementation of which is likely to cause the failure of the offer" [214]".[215] However, all of these defensive mechanisms remain rarely used by French luxury companies and groups, which tend to favour other techniques. Moreover, unlike the United States, France does not allow its companies to adopt poison pills.

Nevertheless, another type of defensive measure is more frequently adopted in the luxury sector in France. Indeed, French companies can opt for a preventive defense measure that is above all adapted to the world of luxury as soon as they are formed: "the commandite par actions". The distribution of power between limited partners and general partners thus makes it possible to protect the company against malicious raiders. Thus, in the event that the investor manages to take over half or more of the capital of the target company, he will only have access to the general meeting of the limited partners.[216] As a result, he will not be able to manage the company as he wishes.

However, this method of defence has important limitations since the general partners need the limited partners to make decisions and vice versa: a good understanding between the two

[210] "Autocontrôle" in French
[211] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p875
[212] C.com., art. L.225-125
[213] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p437
[214] C.com., art. L.233-32 (Fr)
[215] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p849
[216] COZIAN M., VIANDIER A. and DEBOISS F., *Droit des sociétés* (n104), p557

categories of partners is therefore essential. This observation can also be made in the luxury sector, which is not spared from hostile takeovers. Indeed, the fact that Hermès is a limited partnership per share did not prevent LVMH from entering the company's capital. The group held 17.07% of the capital in October 2010 and 20.21% in December 2010. Hermès, a company originally owned by a single family, has therefore decided to create a holding company in order to invest 50% of its capital.[217]

However, to be authorised, this transaction required the filing of a mandatory public offer. Nevertheless, arguing that the house was subject to a hostile takeover, the heirs requested an exemption from the AMF[218], which was granted to them due to the *dangerous nature of the actions carried out by LVMH* and the *possible risk of the family losing control of the company*. As a result, despite the absence of a threat concept in French law, as in the United States, the court indirectly had to rule on the alleged hostile/dangerous nature of LVMH's strategy. In a decision dated May 28, 2013, the Court of Cassation[219] confirmed the AFM's decision, thus implicitly validating the hostile nature of LVMH's strategy. Finally, this decision of the Court of Cassation clearly demonstrates the complexity of establishing a precise control of defensive measures against hostile takeovers in the luxury sector given the legal vacuum in this area. It therefore seems appropriate for the French legislator to establish a clear framework regulating the defences implemented by luxury companies.

§ 110 – Hostile takeovers and the luxury industry in the United-Kingdom. First of all, in the UK, as in France and the United States, luxury companies may sometimes be targeted by hostile takeovers. “Inevitably, a target board when faced with a hostile bid will seek to deploy a number of defensive tactics to fend it off”.[220] However, some defensive measures commonly used in the United-States may be prohibited in the United-Kingdom.

§ 111 – Judicial review of takeover defences and luxury industry in the United-Kingdom. First of all, as in France, the use of poison pills is forbidden in the UK for many reasons. Primarily, article 3 of the Code’s General Principles states that “the board of directors of an offeree company must act in the interests of the company as a whole and must not deny the

[217] DELPECH Xavier, *LVMH c. Hermès : confirmation de dispense d'OPA*, 6 juin 2013, Dalloz actualité
[218] Autorité des marchés financiers / Financial markets authority
[219] Cass. Com. 28 Mai 2013, n° 11-26.423
[220] FAIRFIELD Gillian and ASKARPOUR Shazi, *Defending a hostile takeover: tactics and principles*, Practical Law UK, Reuters, Articles 2-502-5495

holders of securities the opportunity to decide on the merits of the takeover bid"[221]. As a result, since preventing shareholders from voting on a bid is illegal, a board of directors cannot use poison pills to stop the transaction. Otherwise, these measures would be labelled as "frustrating actions"[222]. Therefore, the issue of 'threat' as understood in the US does not arise in the United Kingdom, where poison pills are prohibited and the concept of 'threat' is generally not recognised in UK takeover regulation.

However, the use of poison pills might be allowed in some circumstances. Indeed, in *Criterion Properties plc v Stratford UK Properties LLC and others*[223], the Court stated that poison pills will be tolerated only if "reasonable directors could legitimately have concluded that the economic damage to the company which would have resulted from the predator's acquisition of control justified the company in contingently alienating its assets".[224] While the exact term "threat" is not mentioned here, the courts have referred to the concept of "damage," which may be seen as a similar notion. As a result, the same issue arises in the United Kingdom as in the United States and France: how can this concept be clearly defined within the context of the luxury industry? In the UK as well, legislative clarification would be beneficial.

In the UK, in the absence of specific regulations tailored to the luxury industry, companies should defend themselves by publicly disclosing the board's opinion. For instance, "throughout the bid defence, the target board will use the defence documents it publishes to persuade shareholders that the unsolicited offer should be firmly rejected".[225] However, in doing so, the board must ensure that the information provided is both accurate and equally accessible to all shareholders, failure to do so could lead to liability[226]. Consequently, in the UK, this strategy represents the most effective defence mechanism available to luxury companies.

[221] General Principle 3, the Takeover Code (UK)
[222] FAIRFIELD Gillian and ASKARPOUR Shazi, *Defending a hostile takeover: tactics and principles* (n220)
[223] *Criterion Properties plc v Stratford UK Properties LLC and others* [2002] EWHC 496 (Ch).
[224] THOMSON REUTERS*, Use of poison pills*, 6-106-9528, 20-May-2002
[225] FAIRFIELD Gillian and ASKARPOUR Shazi, *Defending a hostile takeover: tactics and principles* (n220)
[226] *Ibidem*

- **Section 2: The central issue of protecting trade secrets during an M&A transaction in the luxury industry**

§ 112 – The importance of trade secrets in the luxury industry. In most M&As, buyers ask for access to confidential documents in order to ensure of the stability of the target company. However, in some cases, they end up releasing certain confidential information even though they have been told not to. Secrets in the luxury industry are crucial since they help companies to protect their collections, collaborations and more broadly patterns or designs[227]. It is therefore really important for a company to ensure that none of its trade secrets are stolen or disclosed to the public. Indeed, Pragyan JHA stresses that luxury "companies, which are known for their uniqueness along with its velocity, mostly relies upon preserving their competitive advantages through unique patterns, cutting-edge materials, and exclusive procedures".[228] This holds true for France, the United-Kingdom and the United-States. However, depending on the jurisdiction, target company's directors are sometimes compelled to disclose confidential information to the bidder. It is therefore important to understand why is that and what could be implemented in order to protect the company from being deceived.

§ 113 – Trade secrets and fiduciary duties within the luxury industry in the United-States. The target company is often tempted to provide the requested documents since, depending on the system, it may have "a duty to maximise the price"[229]. This is the case in most States of the United States, where when companies are for sale, directors must absolutely conclude with the best deal. This obligation therefore pushes some companies to disclose a lot of confidential information.

In Delaware, the Supreme Court recalled that when the company is for sale or breaking up, directors have a duty to maximise the shareholder value. Indeed, in *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc* [230], the Court explained that "once a company is going to be sold for sure, then the board duties shift to maximise the value to the shareholders"[231]. However, it is important to mention that maximising the value does not specifically mean securing the highest

[227] JHA Pragyan, *Trade Secrets in the Fashion Industry*, Vol. 7 Iss 5, p1746, International Journal of Law Management & Humanities, p1
[228] *Ibidem*
[229] BAUMAN Jeffrey, STEVENSON Russell & RHEE Robert, *Business Organizations Law and Policy* (n184), p944
[230] *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173
[231] According to ROTH Melinda, Professor at George Washington University, March 2025

bid but simply negotiating the more efficient and strategically beneficial outcome for all parties involved. This duty has also been extended to cases where the transaction involves a change of control for the target company.[232] As a result, in these cases, if directors do not seek to maximise the shareholder value, they might face liability. This rule might impact the luxury industry since directors would have to disclose confidential information that can subsequently be released and thereby ruin artists' work. As a result, while Delaware law, and American law, more broadly, are among the most efficient in the world in terms of business, they lack specificity and may consequently harm certain industries, such as haute couture.

§ 114 – Trade secrets and fiduciary duties within the luxury industry in France and the United-Kingdom. In France, unlike in the United States, there is no legal provision requiring the managers of a company for sale to maximise the value of the latter, in other words to obtain the best possible offer. However, the French Court of Cassation, in a ruling dated November 15, 2011[233], held that the directors of a French company must act loyally. Additionally, a management fault committed by a director could also give rise to liability if they fail to act in the company's best interest. As a result, despite the absence of a duty to maximise shareholder value, French directors are nonetheless required to act in the company's best interest during a merger or acquisition. However, it remains difficult to argue that this obligation would compel them to disclose confidential information to bidders. Therefore, the duty of loyalty is unlikely to cause harm to French luxury companies. That said, trade secret violations remain common in France's luxury sector.

Then, in the United-Kingdom, as in France, there no such duty to maximise the shareholder value when the company is for sale. However, section 172 of the Companies Act of 2006[234] states that "to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole". As a result, while the UK legislation sets a duty to act in the interest of the company and the shareholders, directors do not have to maximise the shareholder value. Therefore, as in France, directors of Haute couture houses are not compelled to disclose sensitive information in order to comply with the law. Trade secret violations also remain common in UK's luxury sector.

[232] *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 36 (Del. 1994)
[233] Cass. com. 15 novembre 2011, n° 10-15.049
[234] Companies Act 2006, c. 46, s. 172.

§ 115 – Potential solutions across the French, UK, and US luxury sectors. First of all, in the United-States, where directors must sometimes maximise the shareholder value, luxury companies could protect themselves by including NDAs[235] in their contracts as soon as the merger and acquisition negotiations start. However, an issue remains, these NDA do not prevent M&A negotiations partners from using the misappropriated information to launch their own business. This is for example the case in the litigation opposing *Olapex and L'Oréal*[236] in which L'Oréal had access to a trade secret during M&A negotiations and then used it to build its own business. Non-compete clause[237] would therefore be more suitable in those cases. However, by using these legal measures luxury firms may deter highest bidders from concluding the deal and thereby not maximising the shareholder value.

In France, while luxury companies can also use NDAs, they may also rely on Articles L151-1 et seq. of the Commercial Code[238], which protects trade secrets in the context of a commercial transaction. In the United-Kingdom, luxury companies do not benefit from specific laws providing a right to protect trade secrets during M&A negotiations. However, luxury companies may still use NDAs.

[235] Non-disclosure agreements
[236] THE FASHION LAW, Misappropriation by Acquisition: *Are M&A Discussions Setting Companies Up for Complicated Lawsuits?,* The Fashion law, July 20, 2020, URL: https://www.thefashionlaw.com/misappropriation-by-acquisition-are-ma-discussions-setting-companies-up-for-complex-and-complicated-lawsuits/
[237] GUINCHARD Serge and DEBARD Thierry, *Lexique des termes juridiques 2024-2025*, 32e edition, LeFebvre Dalloz, Août 2024, p.197: See legal definition of the non-compete clause
[238] Art. L. 151-1 et seq. C. com.

GENERAL CONCLUSION

To conclude, while French, British and American jurisdictions may first appear similar, their regulations actually tend to vary from a country to another. However, overall, even though their legislation sometimes differs, legal strategies implemented by luxury companies are usually quite alike.

First of all, France, the United-Kingdom and the United-States all have their own specific company laws. However, the comparison of their legal landscape showed that luxury companies typically tend to opt for the same kinds of legal entities: a practical, safe and easily managed company (SA, SAS, SCA in France; the Private or Public company in the United-Kingdom and the Close or Public corporation in the United States). However, these traditional legal forms may be soon replaced by some more modern forms based on new technologies. For instance, although Decentralised Autonomous Organisations (DAOs) currently appear undeveloped, they may become more attractive in the coming years.

Moving on, in France, the United-Kingdom and the United-States, luxury companies constantly seek to grow bigger and therefore rely on the mechanism of groups to expand. This strategy however faces limitations: in terms of tax matters for example. Moreover, even though the laws differ depending on the jurisdiction, luxury companies are increasingly required to comply with recent ESG/RSE provisions.

Then, mergers and acquisitions are a common strategy in the luxury industry across all three jurisdictions. However, while the laws regulating these mechanisms differ from a country to another, the outcome is the same: M&A activity tends to be limited by competition regulatory authorities as well as by the implementation of takeover defences.

Finally, depending on the country, certain areas of the law still need specific regulation, as the luxury industry may sometimes raise unique legal concerns.

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