

A general and absolute ban on internet sales in the context of a selective distribution network constitutes a restriction of competition “by object”

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In a judgment handed down today in Case C-439/09, the Court of Justice of the European Union (‘ECJ’) held that a general and absolute ban on internet sales in the context of a selective distribution network constitutes a restriction of competition by object within the meaning of Article 101(1) of the Treaty of the European Union (‘TFEU’). Moreover, the selective distribution agreements containing such a ban cannot benefit from the provisions of the Vertical Restraints Block Exemption Regulation (‘VBER’), although they may, if certain conditions are met, benefit from an individual exemption under Article 101(3) TFEU.

Background to the judgment

Pierre Fabre Dermo-Cosmétique (‘PFDC’), one of the companies in the Pierre Fabre group, manufactures and markets a number of cosmetics and personal care products which are sold, mainly through pharmacists, on both the French and the European markets.

Under French law, these products are not classified as medicines and are, therefore, not covered by the pharmacists’ monopoly laid down by French law. However, PFDC’s distribution contracts for these products stipulate that sales must be made exclusively in a ‘physical space’ and in the presence of a qualified pharmacist. This, *de facto*, prevents any sale of PFDC’s products over the internet.

How the case reached the ECJ

In October 2008, the French Autorité de la concurrence (‘the Authority’) adopted a decision in which it considered that such a *de facto* prohibition on internet sales constituted a restriction of competition by object contrary to Article 101(1) TFEU and that, as a result, PFDC’s selective distribution agreements as a whole could not benefit from the exemption provided for in the 1999 VBER (Regulation 2790/1999). The Authority based its conclusion on Article 4(c) of the 1999 VBER (now Article 4(c) of the 2010 VBER) which states that the exemption provided for in the VBER shall not apply to distribution agreements which have as their object:

“the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.”

The Authority also held that PFDC’s selective distributions agreements could not benefit from an individual exemption under Article 101(3) TFEU.

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PFDC challenged the Authority's decision before the Paris Court of Appeal, which saw with some sympathy its arguments and, after suspending the order issued by the Authority, decided to stay proceedings and refer to the ECJ the question of: (i) whether a general and absolute ban on internet sales in the context of a selective distribution network amounts to a restriction of competition by object within the meaning of Article 101(1) TFEU; (ii) whether such a ban prevents selective distribution agreements containing such a ban from benefiting from the provisions of the VBER; and (iii) whether, if such agreements cannot benefit from the VBER, they may nevertheless benefit from an individual exemption under Article 101(3) TFEU.

The case stirred a great deal of interest, attested by the number of interveners in the cases (France, Italy, Poland, the European Commission and the EFTA Surveillance Authority).

The Opinion of Advocate General ('AG') Mazák delivered on 3 March 2011

AG Mazák concluded that a general and absolute ban on internet sales in the context of a selective distribution network constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU. In reaching such a conclusion, the AG rejected PFDC's claims that the total ban on internet sales could be justified either on safety and public health grounds or by the threat of counterfeiting and the risk of free-riding. AG Mazák did, however, accept that there may be circumstances where the sale of certain goods via the internet may undermine the image and thus the quality of those goods, thereby justifying a general and absolute ban on internet sales.

The AG also found that PFDC's selective distribution agreements containing a general and absolute ban on internet sales in the context of a selective distribution network cannot benefit from the VBER as such a ban operates as a limitation on active and passive sales pursuant to Article 4(c) of the VBER. In particular, he rejected the argument that such a ban is equivalent to a prohibition on operating out of an unauthorised establishment, on the basis that *"the internet may not be considered (...) as a (virtual) establishment but rather as a modern means of communication and marketing goods and services"* (paragraph 61).

Finally, he considered that such agreements may nevertheless benefit from individual exemption pursuant to Article 101(3) TFEU.

The judgment of the ECJ

The ECJ followed the Opinion of AG Mazák in some, but not all, respects.

First, the ECJ concluded, albeit on the basis of slightly different reasoning than the AG, that a general and absolute ban on internet sales in the context of a selective distribution network constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU. The ECJ started by noting that such a ban *"considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector"* (paragraph 38). Then, like the AG, it rejected PFDC's claim that the ban could be justified on safety and public health grounds. Finally, and contrary to the AG, the ECJ generally concluded that *"the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU"* (paragraph 46).

Second, and like the AG, the ECJ held that PFDC's selective distribution agreements containing a general and absolute ban on internet sales in the context of a selective distribution network cannot benefit from the VBER because such a ban operates as a limitation on active and passive sales pursuant to Article 4(c) of the VBER.

Finally, and again agreeing with the AG, the ECJ found that the selective distribution agreements may nevertheless benefit from individual exemption

pursuant to Article 101(3) TFEU, provided the four cumulative conditions laid down in that provision are met. However, the ECJ considered that in this case, it did not have sufficient information before it to assess whether PFDC's selective distribution agreements satisfy the conditions of Article 101(3) TFEU (paragraphs 49 and 50).

Comment

It is interesting to note that the judgment suggests that the concepts of 'restriction of competition by object' and of 'hardcore restriction' are the same thing. This can be seen from paragraphs 32 to 33 of the ECJ's judgment:

"It is to be observed at the outset that neither Article 101 TFEU nor Regulation No 2790/1999 refer to the concept of 'hardcore' restriction of competition.

In those circumstances, the question referred for a preliminary ruling must be understood as seeking to ascertain, firstly, whether the contractual clause at issue in the main proceedings amounts to a restriction of competition 'by object' within the meaning of Article 101(1) TFEU".

The ECJ's finding can be contrasted with the position espoused by the European Commission in its pleadings, as recorded by AG Mazák at paragraph 24 of his Opinion: "[t]he Commission however in its pleadings before the Court clarified its position on this point by stating that while there may be links between them, a restriction by object and a hardcore restriction constitute two distinct legal concepts."

Second, the judgment confirms the position adopted by the European Commission at paragraph 56 of its 2010 Vertical Restraints Guidelines where it stated that "obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop" constitute a restriction of competition by object. However, and as the Guidelines also note, this does not mean that the criteria imposed for internet sales must be identical to those imposed for bricks and mortar sales, but rather that they should pursue the same objectives, achieve comparable results and that the difference between the criteria must be justified by the different nature of the modes of distribution.

Finally, brand owners seeking to protect the image of their products will be disappointed by the Court's general and unqualified statement that "the aim of maintaining a prestigious image is not a legitimate aim for restricting competition." As AG Mazák had rightly pointed in his Opinion, there may be instances where the sale of certain goods via the internet does undermine the image and thus the quality of those goods and so can justify a general and absolute ban on internet sales.

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