JUDGMENT OF THE COURT (Third Chamber)

13 October 2011 *

In Case C-439/09,

REFERENCE for a preliminary ruling under Article 234 EC from the cour d'appel de Paris (France), made by decision of 29 October 2009, received at the Court on 10 November 2009, in the proceedings

Pierre Fabre Dermo-Cosmétique SAS

v

Président de l'Autorité de la concurrence,

Ministre de l'Économie, de l'Industrie et de l'Emploi,

intervening parties:

Ministère public,

* Language of the case: French.

European Commission,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G.Arestis, T. von Danwitz and D. Šváby Judges,

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2010,

after considering the observations submitted on behalf of:

— Pierre Fabre Dermo-Cosmétique SAS, by J. Philippe, avocat,

— the président de l'Autorité de la concurrence, by B. Lasserre, F. Zivy, I. Luc and L. Gauthier-Lescop,

— the French Government, by G. de Bergues and J. Gstalter, acting as Agents,

— the Italian Government, by M. Massella Ducci Teri, avvocato dello Stato,

— the Polish Government, by M. Szpunar, acting as Agent,

— the European Commission, by P.J.O. Van Nuffel and A. Bouquet, acting as Agents,

— the EFTA Surveillance Authority, by O. Einarsson and F. Simonetti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 81(1) and (3) EC and of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p.21).

2 The reference has been made in an action for annulment and, in the alternative, for amendment by Pierre Fabre Dermo-Cosmétique SAS ('Pierre Fabre Dermo-Cosmétique') against decision No 08-D-25 of 29 October 2008 ('the contested decision') of the Conseil de la concurrence (French Competition Board; now, since 13 January 2009, the Autorité de la concurrence (French Competition Authority)), regarding the ban imposed by Pierre Fabre Dermo-Cosmétique, contained in its selective distribution contracts, on distributors which it previously chose to authorise, on the sale of its cosmetics and personal care products via the internet, contrary to the provisions of Article L. 420-1 of the code de commerce (Commercial Code) and Article 81 EC.

Legal context

European Union legislation

3 Recital 10 in the preamble to Regulation No 2790/1999 states:

'This Regulation should not exempt vertical agreements containing restrictions which are not indispensable to the attainment of the positive effects mentioned above; in particular, vertical agreements containing certain types of severely anti-competitive restraints such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.'

4 Article 1(d) of Regulation No 2790/1999 defines a 'selective distribution system' as 'a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors'.

5 Article 2(1) of Regulation No 2790/1999 provides:

'Pursuant to Article 81(3) of the Treaty [Article 101(3) TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) [Article 101(1) TFEU] shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements").

This exemption shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 81(1) [Article 101(1) TFEU] ("vertical restraints")'.

6 Under Article 3(1) of that regulation '…the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services'.

7 Article 4 of Regulation No 2790/1999 provides that the exemption to the prohibition laid down in Article 81(1) EC [Article 101(1) TFEU] is not to apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

'…

(c) 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;

…'

National legislation

8 Article L. 420-1 of the French Commercial Code provides:

'Common actions, agreements, express or tacit understandings or coalitions, particularly when they are intended to:

(1) limit access to the market or the free exercise of competition by other undertakings;

(2) prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices;

(3) limit or control production, markets, investment or technical progress;

(4) share markets or sources of supply, shall be prohibited, even through the direct or indirect intermediation of a company in a group established outside France, when they have the object, or may have the effect, of preventing, restricting or distorting competition in a market.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Pierre Fabre Dermo-Cosmétique is one of the companies in the Pierre Fabre group. It manufactures and markets cosmetics and personal care products and has several subsidiaries, including, inter alia, the Klorane, Ducray, Galénic and Avène laboratories, whose cosmetic and personal care products are sold, under those brands, mainly through pharmacists, on both the French and the European markets.

10 The products at issue are cosmetics and personal care products which are not classified as medicines and are, therefore, not covered by the pharmacists' monopoly laid down by the code de la santé publique (Public Health Code).

11 In 2007, the Pierre Fabre group had 20 % of the French market for those products.

12 Distribution contracts for those products in respect of the Klorane, Ducray, Galénic and Avène brands stipulate that such sales must be made exclusively in a physical space, in which a qualified pharmacist must be present.

13 Articles 1.1 and 1.2 of the general conditions of distribution and sale of the brands stipulate:

'The authorised distributor must supply evidence that there will be physically present at its outlet at all times during the hours it is open at least one person specially trained to:

acquire a thorough knowledge of the technical and scientific characteristics of the products…, necessary for the proper fulfilment of the obligations of professional practice…

regularly and consistently give the consumer all information concerning the correct use of the products...

give on-the-spot advice concerning sale of the…product that is best suited to the specific health or care matters raised with him or her, in particular those concerning the skin, hair and nails.

In order to do this, the person in question must have a degree in pharmacy awarded or recognised in France…

The authorised distributor must undertake to dispense the products…only at a marked, specially allocated outlet…'

14 Those requirements exclude *de facto* all forms of selling by internet.

15 By decision of 27 June 2006, the Competition Authority opened an ex officio investigation of practices in the distribution sector for cosmetics and personal care products.

16 By decision No 07-D-07 of 8 March 2007, the Competition Authority approved and made binding the commitments proposed by the group of undertakings concerned, with the exception of Pierre Fabre Dermo-Cosmétique, to amend their selective distribution contracts in order to enable the members of their networks to sell their products via the internet, subject to certain conditions. The proceedings opened against Pierre Fabre Dermo-Cosmétique followed their ordinary course.

17 During the administrative proceedings, Pierre Fabre Dermo-Cosmétique explained that the products at issue, by their nature, require the physical presence of a qualified pharmacist at the point of sale during all opening hours, in order that the customer may, in all circumstances, request and obtain the personalised advice of a specialist, based on the direct observation of the customer's skin, hair and scalp.

18 In view of the fact that there might be an effect on trade between the Member States, the Competition Authority analysed the practice in question in the light of the provisions of French competition law and European Union law.

19 In the contested decision, the Competition Authority first of all noted that the ban on internet sales amounted to a limitation on the commercial freedom of Pierre Fabre Dermo-Cosmétique's distributors by excluding a means of marketing its products. Moreover, that prohibition restricted the choice of consumers wishing to purchase online and ultimately prevented sales to final purchasers who are not located in the 'physical' trading area of the authorised distributor. According to the Authority, that

limitation necessarily has the object of restricting competition, in addition to the limitation inherent in the manufacturer's very choice of a selective distribution system, which limits the number of distributors authorised to distribute the product and prevents distributors from selling the goods to non-authorised distributors.

20 Since Pierre Fabre Dermo-Cosmétique's market share is less than 30 %, the Competition Authority examined whether the restrictive practice could benefit from the block exemption provided for in Regulation No 2790/1999. Although the practice of prohibiting internet selling is not expressly referred to in that regulation, it is equivalent to a ban on active and passive sales. Consequently, the practice falls within Article 4(c) of the regulation, which excludes restrictions on active or passive sales by members of a selective distribution system from the automatic block exemption.

21 According to the Competition Authority, the ban on internet sales does not meet the conditions for exception provided for in Article 4(c) of Regulation No 2790/1999, according to which those restrictions on sales are without prejudice to the possibility of prohibiting a member of the system from operating 'out of an unauthorised place of establishment'. The Authority held that the internet is not a place where goods are marketed, but an alternative means of selling which is used in the same way as direct selling in a shop or mail-order selling by distributors in a network which have physical outlets.

22 Moreover, the Competition Authority noted that Pierre Fabre Dermo-Cosmétique failed to demonstrate that it could benefit from an individual exemption pursuant to Article 81(3) EC and to Article L. 420-4, paragraph 1, of the Commercial Code.

23 In that regard, the Authority rejected Pierre Fabre Dermo-Cosmétique's argument that the ban on internet sales at issue contributes to improving the distribution of dermo-cosmetic products whilst avoiding the risks of counterfeiting and of free-riding between authorised pharmacies. Pierre Fabre Dermo-Cosmétique's choice of a selective distribution system, with the presence of a pharmacist at the place of sale, guaranteed that an advisory service is provided at all authorised pharmacies and that each of them bears the cost.

24 In response to Pierre Fabre Dermo-Cosmétique's argument on the need for a pharmacist to be physically present when the products at issue are purchased, in order to ensure the consumer's well-being, the Competition Authority first of all noted that the products concerned were not medicines. In this respect, the specific legislation by which they are governed concerns rules which apply to their manufacture and not to their distribution which is free, and, moreover, a pharmacist does not have the power to make a diagnosis, only a doctor being authorised to do so. The Competition Authority then applied Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, concerning restrictions on the distribution of non-prescription medicines via the internet, to the products at issue.

25 According to the Competition Authority, Pierre Fabre Dermo-Cosmétique also failed to demonstrate in what way visual contact between the pharmacist and the users of the product ensures 'cosmetovigilance', which requires health-care professionals to record and communicate any adverse reactions to cosmetic products. Indeed, any negative effects of the products at issue will become apparent only after the product has been used and not when it is purchased. In the event of problems linked to its use, the patient will tend to consult a doctor.

26 In response to Pierre Fabre Dermo-Cosmétique's final argument, the Competition Authority did not find the fact that internet distribution does not lead to a reduction in prices to be relevant. The benefit for the consumer lies not only in the reduction

of prices, but also in the improvement of the service offered by the distributors including, inter alia, the possibility of ordering the products at a distance, without time restrictions, with easy access to information about the products and allowing prices to be compared.

27 The Competition Authority thus concluded that the ban imposed by Pierre Fabre Dermo-Cosmétique on its authorised distributors on selling via the internet amounts to a restriction on competition contrary to Article 81 EC and Article L. 420-1 of the Commercial Code, and ordered it to remove from its selective distribution contracts all terms that are equivalent to a ban on internet sales of its cosmetics and personal care products and to make express provision in its contracts for an option for its distributors to use that method of distribution. Pierre Fabre Dermo-Cosmétique was ordered to pay a fine of EUR 17 000.

28 On 24 December 2008, Pierre Fabre Dermo-Cosmétique brought an action for annulment and, in the alternative, for amendment of the contested decision before the cour d'appel de Paris. At the same time Pierre Fabre Dermo-Cosmétique requested the first president of the court to stay execution of the contested decision. In support of its action, Pierre Fabre Dermo-Cosmétique claimed, primarily, that the contested decision was vitiated by an error of law in that it denied the contested practice the benefit of both the block exemption provided for in Regulation No 2790/1999 and the individual exemption provided for in Article 81(3) EC.

29 On 18 February 2009, the first president of the cour d'appel de Paris ordered a stay of execution of the orders made by the Competition Authority against Pierre Fabre Dermo-Cosmétique until the referring court had ruled on the merits of the action.

30 In its order for reference, the cour d'appel de Paris, after recalling the reasons behind the contested decision, and the content of the written observations that the European Commission presented pursuant to Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p.1), nevertheless noted that neither the Commission's guidelines nor its observations were binding on the national courts.

31 In those circumstances, the cour d'appel de Paris decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]'

Consideration of the question referred

32 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.

33 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, secondly, whether a selective distribution contract containing such a clause – where it falls within the scope of Article 101(1) TFEU – may benefit from the block exemption established by Regulation No 2790/1999 and, thirdly, whether, where the block exemption is inapplicable, the contract could nevertheless benefit from the exception provided for in Article 101(3) TFEU.

The classification of the restriction in the contested contractual clause as a restriction of competition by object

34 It must first of all be recalled that, to come within the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'. It has, since the judgment in Case 56/65 *LTM* [1966] ECR 235 been settled case-law that the alternative nature of that requirement, indicated by the conjunction 'or', leads, first, to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where the anticompetitive object of the agreement is established it is not necessary to examine its effects on competition (see Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 55 and the case-law cited).

35 For the purposes of assessing whether the contractual clause at issue involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part (see *GlaxoSmithKline and Others* v *Commission and Others*, paragraph 58 and the case law cited).

36 The selective distribution contracts at issue stipulate that sales of cosmetics and personal care products by the Avène, Klorane, Galénic and Ducray brands must be made in a physical space, the requirements for which are set out in detail, and that a qualified pharmacist must be present.

37 According to the referring court, the requirement that a qualified pharmacist must be present at a physical sales point *de facto* prohibits the authorised distributors from any form of internet selling.

38 As the Commission points out, by excluding *de facto* a method of marketing products that does not require the physical movement of the customer, the contractual clause 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.

39 As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market (Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 33). Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.

40 However, it has always been recognised in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors

other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU (*AEG-Telefunken* v *Commission*, paragraph 33).

41 In that regard, the Court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875, paragraph 20, and Case 31/80 *L'Oréal* [1980] ECR 3775, paragraphs 15 and 16).

42 Although it is for the referring court to examine whether the contractual clause at issue prohibiting *de facto* all forms of internet selling can be justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see *L'Oréal*, paragraph 14).

43 It is undisputed that, under Pierre Fabre Dermo-Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.

44 In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice

to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, *Deutscher Apothekerverband*, paragraphs 106, 107 and 112, and Case C-108/09 *Ker-Optika* [2010] ECR I-12213, paragraph 76).

45 Pierre Fabre Dermo-Cosmétique also refers to the need to maintain the prestigious image of the products at issue.

46 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.

47 In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

The possibility of a block exemption or an individual exemption

48 If it is established that an agreement or contractual clause restricts competition within the meaning of Article 101(1) TFEU, it will be for the referring court to examine whether the conditions in paragraph 3 of that article are met.

49 The possibility for an undertaking to benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU derives directly from the Treaty. It is not contested in any of the observations submitted to the Court. That possibility is also open to the applicant in the main proceedings.

50 However, in that regard, given that the Court does not have sufficient information before it to assess whether the selective distribution contract satisfies the conditions in Article 101(3) TFEU, it is unable to provide further guidance to the referring court.

51 As regards the possibility that the selective distribution contract may benefit from the block exemption of Regulation No 2790/1999, it should be noted that the categories of vertical agreements that are eligible have been defined by the Commission in that regulation, on the basis of the Council's authorisation contained in Council Regulation No 19/65/EEC of 2 March 1965 on the application of [81(3)] of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965-1966, p. 35).

52 Under Articles 2 and 3 of Regulation No 2790/1999, a supplier, in the context of a selective distribution system, may, in principle, benefit from an exemption, where its market share does not exceed 30 %. It is apparent from the documents before the Court that Pierre Fabre Dermo-Cosmétique's market share does not exceed that threshold. However, that regulation, pursuant to Article 2 of Regulation No 19/65,

has excluded certain types of restrictions that have severely anticompetitive effects, irrespective of the market share of the undertakings concerned.

53 Hence, it follows from Article 4(c) of Regulation No 2790/1999 that the exemption is not to apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, 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.

54 A contractual clause such as the one at issue in the main proceedings, prohibiting *de facto* the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.

55 According to Pierre Fabre Dermo-Cosmétique, the ban on selling the contractual products via the internet is equivalent however to a prohibition on operating out of an unauthorised establishment. It submits that, since the conditions for exemption laid down at the end of the provision, cited in paragraph 53, are thus met, Article 4 does not apply to it.

56 It should be pointed out that, by referring to 'a place of establishment', Article 4(c) of Regulation No 2790/1999 concerns only outlets where direct sales take place. The question that arises is whether that term can be taken, through a broad interpretation, to encompass the place from which internet sales services are provided.

57 As regards that question, it should be noted that, as an undertaking has the option, in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, thus enabling its rights to be protected, it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption.

58 Accordingly, a contractual clause, such as the one at issue in the main proceedings, prohibiting *de facto* the internet as a method of marketing cannot be regarded as a clause prohibiting members of the selective distribution system concerned from operating out of an unauthorised place of establishment within the meaning of Article 4(c) of Regulation No 2790/1999.

59 In the light of the foregoing considerations, the answer to the second and third parts of the question referred for a preliminary ruling is that Article 4(c) of Regulation No 2790/1999 must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting *de facto* the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

Article 4(c) of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting *de facto* the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

[Signatures]