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Advocate General Mazák confirms Commission's approach regarding internet sales in selective distribution systems

Advocate General's opinion in case *Pierre Fabre Dermo-Cosmétique*

On 3 March 2011 Advocate General Ján Mazák has delivered his opinion to the Court of Justice of the European Union ("ECJ") on the case *Pierre Fabre Dermo-Cosmétique SAS*¹ in which he inter alia stated that a general and absolute ban on internet sales imposed by a manufacturer on a distributor is proportionate only in very exceptional circumstances. Even though the ECJ does not necessarily follow the Advocate Generals' opinions, they provide in most instances an indication for the outcome of the cases.

Facts and proceedings

Pierre Fabre Dermo-Cosmétique SAS ("PFDC") manufactures and markets cosmetics and personal care products. The contracts awarded by PFDC for the distribution of cosmetics and personal care products in respect of the brands Avène, Klorane, Galénic and Ducray stipulate that such sales must be made in a physical space and that a qualified pharmacist must be present, thereby excluding *de facto* all forms of selling via the internet.

In June 2006 the French Competition Board ("the Board") initiated an *ex officio* investigation of practices in the distribution sector for cosmetics and personal care products and found that in prohibiting authorized distributors from selling products via the internet, PFDC limits the commercial freedom of its distributors by excluding a means of modern marketing.² The Board decided that the ban, when operated within a selective distribution network, constitutes a hardcore restriction under Art. 4(c) of Regulation No. 2790/1999

("Vertical-BER")³. The Board stressed that hardcore restrictions are restrictions of competition by object that cannot benefit from an automatic exemption under the Vertical-BER and that PFDC had not provided any evidence for an exemption pursuant to Art. 81(3) EC (now Art. 101(3) TFEU). In its decision, the Board ordered PFDC to remove from its selective distribution contracts all terms that are equivalent to a ban on internet selling and to make express provisions for an option for its distributors to use online sales as a method of distribution. A fine of EUR 17,000 was imposed on PFDC.

PFDC appealed this decision on 24 December 2008. The Cour d'appel de Paris referred the following question to the ECJ for a preliminary ruling:

"Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorized distributors in the context of a selective distribution network, in fact constitute a 'hardcore' restriction of competition by object for the purposes of Art. 81(1) EC 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 Art. 81(3) EC?"

The Advocate General's Opinion

Restriction by object

The Advocate General concludes that "a general and absolute ban on selling goods to end-users via the internet imposed on authorized distributors in the context of a

¹ Advocate General's Opinion, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, C-439/09.

² Decision of the French Competition Board, No. 08-D-25 of 29 October 2008.

³ 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.

selective distribution network [...] which goes beyond what is objectively necessary in order to distribute those goods in an appropriate manner in the light not only of their material qualities but also their aura or image, has the object of restricting competition for the purpose of Art. 81(1) EC".⁴

Objective justification

While analyzing whether there was an objective justification for the ban in question, the Advocate General states that PFDC's products are not medicinal products and that there is no regulatory requirement either at national or Union level to mandate their sale in a physical space and only in the presence of a qualified pharmacist.⁵ The Advocate General does not exclude the possibility that in certain exceptional circumstances private voluntary measures (as opposed to limitations imposed by national or European law) limiting the sales of goods or services via the internet could be objectively justified, by reason of the nature of the goods or services or the customers to whom they are sold. However, he points out that the legitimate objective must be of a public law nature and must go beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products.⁶ According to the Advocate General's view, PFDC's claims regarding the correct use of its products and the alleged need for advice by a pharmacist thus do not constitute an objective justification for a general and absolute ban on internet sales.

If restrictions aim at protecting the products' image or the manner in which they are marketed they must, in the Advocate General's opinion, be examined in the light of the case-law of the European courts on selective distribution.⁷ Given the case-law, a manufacturer can impose appropriate, reasonable and non-discriminatory conditions concerning sales via the internet in order to protect the image of its products. However, the general and absolute ban on internet sales seems to be proportionate only in very exceptional circumstances. Thus, the Advocate General suggests that the referring court should examine whether individualized information and advice on the products in

question could be adequately provided over the internet to users. He also points out that a ban on internet sales eliminates a modern distribution tool which allows customers to shop for products outside the normal catchment area and thereby potentially enhances intra-market competition.⁸

Internet no virtual establishment

The Advocate General stresses that the total ban on internet sales constitutes a hardcore restriction since it limits active and passive sales (Art. 4(c) Vertical-BER) and therefore cannot benefit from the Vertical-BER.⁹ He disagrees with PFDC's view that sales on the internet should be classified as sales from an unauthorized (virtual) place of establishment pursuant to Art. 4(c) Vertical-BER.¹⁰

Individual exemption pursuant to Art. 81(3) EC

The Advocate General finally points out that an anti-competitive agreement may benefit from an individual exemption provided by Art. 81(3) EC (now Art. 101(3) TFEU). However, due to the lack of sufficient evidence provided to the court on the matter, the Advocate General considers the ECJ to be unable to provide any indications in this regard.¹¹

Comment

The Advocate General's opinion is in line with the "old" Vertical Guidelines of 2000¹² and the "new" Vertical Guidelines of 2010¹³. The Commission expressly points out in paragraph 56 of the Vertical Guidelines of 2010 that within a selective distribution system dealers should be free to sell, both actively and passively, to all end users, also by means of the internet.

Freedom of internet sales has been very high on the Commission's agenda since the inclusion of first explanations on internet selling in the Vertical Guidelines 2000. However, the Commission did not make the protection of such freedom expressly part of the law, thereby indirectly allowing for this litigation to happen. It would therefore be a welcome development if the opinion at hand now received the backing of the ECJ, thus

⁴ C-439/09, para 57.

⁵ C-439/09, para 34.

⁶ C-439/09, para 35.

⁷ C-439/09, para 36; Court of Justice, *Copad*, C-59/08 [2009] ECR I-3421; General Court, *Leclerc v Commission*, T-88/92, [1996] ECR II-1961.

⁸ C-439/09, para 56.

⁹ C-439/09, para 62.

¹⁰ C-439/09, para 61.

¹¹ C-439/09, para 67.

¹² Commission Guidelines on Vertical Restraints, 13 October 2000, C 291/01.

¹³ Commission Guidelines on Vertical Restraints, 19 May 2010, C 130/01.

making the rule part of applicable law. In consequence national competition authorities and courts would have to follow the same principles with respect to internet sales.

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