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The prohibition of onlines sales demeed to be a “hardcore” restriction by the advocate general of the Court of Justice of the European Union

In his non binding opinion issued on March 3, 2011, the Advocate General of Court of Justice of the European Union (“CJEU”) seems to follow the reasoning of the *Conseil de la Concurrence* (the French Competition Council, now known as *Autorité de la Concurrence, i.e.* Competition Authority) that had considered, in Decision n°08-D-25 rendered on October 29, 2008, that the company Pierre Fabre Dermo-Cosmétique (“PFDC”) had breached Article L. 420-1 of the French Commercial Code and Article 81.1 of the EC Treaty (now Article 101.1 of the Treaty on the functioning of the European Union) by imposing a general and absolute ban on the sale of its products via the Internet by its authorized distributors.

In the distribution agreements for cosmetic and personal care products in respect of the Avène, Galénic and Ducray brands, PFDC had inserted a clause stipulating that the sales of its products must be made in a brick and mortar shop and in the presence of a qualified pharmacist[1]; *de facto* excluding sales via the Internet.

A brief procedural reminder of the PFDC “saga”

a) Decision n°08-D-25 of the *Conseil de la Concurrence* against PFDC

By a decision dated June 27, 2006, the *Conseil de la Concurrence* opened an *ex officio* investigation on the

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practices of eleven companies in the distribution sector for cosmetics and personal care products.

All the companies under investigation – with the exception of PFDC – offered to make binding commitments to amend their distribution agreements and to give their authorized distributors the option of selling their products via the Internet.

In Decision n°07-D-07 dated March 8, 2007, the *Conseil de la Concurrence* ended proceedings against ten of the above-mentioned manufacturers on the basis of the said commitments but continued the legal proceedings against PFDC.

According to PFDC, the refusal to sell via the Internet is justified by the nature of the products, which are designed as health care products, the purchase of which requires the advice of a qualified pharmacist:

"The design of these products requires advice from a qualified pharmacist because of the way in which those products act, as they have been developed as health care products. ... Our products are suitable for specific skin problems, for example, intolerant skins where there is a risk of an allergic reaction. Hence, we consider that internet selling would not meet the expectations that consumers and health professionals have of our products and consequently the requirements we lay down in our general conditions of sale".

Disregarding PFDC's arguments, the *Conseil de la Concurrence* considered that the relevant clause – which resulted *de facto* in a general and absolute ban on Internet sales – was anti-competitive *per se*; it sentenced PFDC to a EUR 17,000 fine and ordered it to remove the relevant clause from its distribution agreements.

PFDC appealed against the decision of the *Conseil de la Concurrence* on December 24, 2008, and the Paris Court of Appeals, in February 2009, ordered the suspension of the injunctions issued by the *Conseil de la Concurrence*.

b) The Paris Court of Appeals exercised a genuine control over the decision of the *Conseil de la Concurrence*

In its bold decision dated October 29, 2009 (and while the European Commission, of its own initiative, intervened in the proceedings to support the *Conseil de la Concurrence* as "*amicus curiae*"), the Paris Court of Appeals decided to stay the proceedings to refer a question to the CJEU for a preliminary ruling. Indeed, it considered that:

1. neither the guidelines (which, unlike regulations, are not binding), nor the Commission's opinion were binding upon it as a local court and;
2. despite the Commission and the *Conseil de la Concurrence* reaching the same conclusion (i.e. the *per se* restrictive nature of the relevant practices), the arguments on which they relied were different.

The Court also emphasized that the arguments put forth by Pierre Fabre were not unfounded but rather "serious".

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In doing so, the Paris Court of Appeals shows that it intends to exercise a genuine and independent control over the decision of the *Conseil de la Concurrence* by implying that it will not follow the authority's position without due review and by implicitly pointing out the inconsistencies in its reasoning.

Indeed, how could the *Conseil de la Concurrence* consider a clause prohibiting online sales as a "hardcore" restriction (a *per se* violation):

- solely on the grounds of guidelines which do not have binding effect (as a reminder, neither Regulation n° 1790/1999, nor the new Regulation 330/2010 expressly list the prohibition of online sales as falling under the "black clauses"; it is only mentioned in the guidelines which do not have binding force); and while it ended proceedings against PFDC's competitors in exchange for mere commitments to amend such a clause. In this regard, the Paris Court of Appeals seems quite receptive to the inconsistencies in the *Conseil de la Concurrence*'s reasoning pointed out by PFDC, amongst which the fact that, according to the *Conseil*, the relevant clause could fall within an exemption if it appeared as "objectively justified" all while considering that this same clause is a per se violation and thus cannot benefit from any exemption. Furthermore, the fact that the *Conseil de la Concurrence* approved commitments made by the ten other manufacturers with regards to the relevant clause and the relatively low fine ordered against PFDC (17,000 Euros) are incompatible with the *per se* nature of the violation.

The question referred to the CJEU for a preliminary ruling is thus to know whether, in the absence of legally binding provisions, "*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 constitutes a "hardcore" restriction of competition by object for the purposes of Article 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 Article 81(3) EC?*".

The Paris Court of Appeals decided to stay the proceedings until the decision of the CJEU.

The substance of the Advocate General's opinion

In his opinion dated March 3, 2011, the Advocate General broke the preliminary question of the Paris Court of Appeals down into three distinct sub-questions:

1. Does a general and absolute ban on selling the contract goods to end-users via the Internet, imposed on authorized distributors in the context of a selective distribution network, have the object of restricting competition for the purposes of Article 81(1) EC?
2. If yes, can such a restriction benefit from the block exemption provided for by Regulation No 2790/1999?
3. In the event that the restriction in question cannot benefit from the block exemption, can it benefit from an individual exemption pursuant to Article 81(3) EC?

In conclusion to substantial discussion laid out in his opinion, the Advocate General answered each of the

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above-mentioned questions in the following manner:

- Firstly, a general and absolute ban on online sales imposed on authorized distributors exceeds the restrictions inherent to any selective distribution agreement and is disproportionate with regards to what is objectively required for the protection of the material qualities of the products but also of the aura or image of the products. Consequently, the object of this ban is indeed the restriction of competition with respect to Article 81(1) EC.
- Furthermore, this absolute ban constitutes a "hardcore restriction" in that it restricts active and passive sales within the meaning of Article 4 c) of Regulation 2790/1999 and is thus ineligible for any block exemption.
- Lastly, an agreement with such a general and absolute ban on online sales may be eligible for an individual exemption provided it meets the four cumulative conditions prescribed under Article 81(3) of the EC Treaty.

Final observations

If, in substance, the Advocate General, Jan Mazak, follows the decision of the *Conseil de la Concurrence*, his opinion is not binding on the CJEU which should render its decision shortly. This decision is long awaited as, beyond the local implications of this case, it should have an impact on product distribution practices in Europe as a whole, specifically with regards to online sales.

According to some authors, the absolute prohibition of bans on online sales could prejudice selective distribution by supporting sales via the Internet at the expense of "brick and mortar" distributors, given that the costs of setting up a shop display by far exceed those of selling online.

Should the CJEU render a decision approving the Advocate General's reasoning, it should not be overlooked that a number of residual possibilities subsist for the leader of a selective distribution network to, at the very least, limit the sales of its products via the Internet:

- The supplier can still impose quality standards for online sales: "*the supplier may require quality standards for the use of the Internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general*" (paragraph 54 of Guidelines 330/2010).
- The supplier can still exclude "*pure players*" from selling via the Internet: the supplier may "*require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system*". In order to ensure the effectiveness of such a contractual provision, the supplier may even require a minimum turnover percentage or sales volume to be achieved in brick and mortar shops;
- The supplier can also restrict the sales of its distributors to end-users: the supplier can restrict "*its selected dealers from selling more than a given quantity of contract products to an individual end user. Such a requirement may have to be stricter for online sales*".

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[1] Article 1.1 of the general conditions of the contracts requires each distributor "*to 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 give on-the-spot advice concerning sale of the [PFDC] 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*". Article 1.2 states that the products concerned may be sold only "*at a marked, specially allocated outlet*".

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